No. 773

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Superior Court of New Jersey

Appellate Division

Docket No. A 504-56

ANGEL PAIN VARGAS,
Plaintiff-Appellant,
vs.
A. H. BULL STEAMSHIP CO.,
Defendant-Respondent.

FELIPE ALMESTICA,
Plaintiff-Appellant,
vs.
BALTIMORE INSULAR LINE, INC.,
Defendant-Respondent.

JUAN ECHEVARRIA RODRIGUEZ,
Plaintiff-Appellant,
vs.
A. H. BULL STEAMSHIP CO.,
Defendant-Respondent.

Civil Action

On Appeal from Superior Court, Essex County, Law Division

Sat below:

Gaulkin, J.C.C. (Temporarily Assigned)

BRIEF AND APPENDIX FOR APPELLANTS

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STATEMENT OF QUESTIONS INVOLVED

1. Has a state court the power to dismiss under the forum non conveniens doctrine a suit arising under the Jones Act (46 U. S. C. Sec. 688)?

2. May the doctrine of forum non conveniens be applied in the only jurisdiction in which plaintiff can obtain involuntary service of process upon the defendant?

STATEMENT OF THE CASE

1. These three cases, consolidated for argument, have, for present purposes, substantially identical facts. All three plaintiffs are Puerto Ricans, and the two defendants are corporations of New Jersey. All three suits were brought in the Superior Court of New Jersey under the Jones Act, 46 U. S. C. Sec. 688. The controversies arise out of injuries sustained by the plaintiffs while loading ships owned by the defendants in navigable waters off Puerto Rico. The complaints were filed on October 1, 1956, and before answer, the defendants moved to dismiss the complaint, alleging in their motion that the suits are those in which the court should apply the doctrine of forum non conveniens and requesting the court to dismiss the actions on grounds set forth in the Notice of Motion (P10a to P24a). After the filing of extensive briefs and argument, the court filed its opinion on April 4, 1957, granting the application to dismiss the complaints, (P25a–P41a). Subsequently and on April 5, 1957 orders of dismissal were entered in each of the cases (P42a–P47a). The orders of dismissal were in conformity with the determination of the court and provided for the payment by the defendants to the plaintiffs of the costs of filing the complaint and service of the same and in addition thereto a counsel fee in the sum of $200.00 in each case. Subsequently and on May 16, 1957, there was filed separate Notices of Cross-Appeal by the defendants from the allowance to the plaintiffs of the counsel fees set forth above.

ARGUMENT

POINT I

A State Court Lacks Jurisdiction to Dismiss a Suit Under the Jones Act Under the Doctrine of Forum Non Conveniens.

The Jones Act, 46 U. S. C. Sec. 688, provides as follows:

> "Sec. 688. Recovery for injury to or death of seaman.
>
> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action *all* statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. *Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.*" (Emphasis supplied.)

The statutes concerning actions for personal injury and death to railway employees which the Jones Act applies *in toto* to seamen are contained in the Federal Employers' Liability Act, 45 U. S. C. Sec. 51-60. The section of that act relevant to the present appeal is 45 U. S. C. Sec. 56, which provides in pertinent part:

"Sec. 56. Actions; limitations; concurrent jurisdiction of courts

* * * *

"Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several states."

Since the Jones Act provides that *all* statutes of the Federal Employers' Liability Act shall apply to seamen, obviously the venue rights granted by 45 U. S. C. Sec. 56 may be invoked by seamen. But there is a significant difference between the venue rights of seamen under the Jones Act and those of railroad workers under the F. E. L. A. Under Sec. 6 of the F. E. L. A. (45 U. S. C. Sec. 56) a railroad worker may enforce his right of action in any court, state or federal, in which the defendant does business; and a state court of competent jurisdiction must accept the case. *Second Employers' Liability Cases*, 223 U. S. 1, 58-59 (1912). However, the last sentence of the Jones Act restricts the venue of seamen's suits. The word "jurisdiction" in that sentence has been construed as a synonym for venue, and the consequent venue limitation imposed has been restricted in its operation to seamen's suits brought in federal courts. *Bainbridge v. Merchants and Miners Co.*, 287 U. S. 278 (1932). The upshot of these two statutes, then, is that a seaman may bring his Jones Act action in any state court where the venue requirements of 45 U. S. C. Sec. 56 are met, but when he brings his action in a federal court he is restricted by the last sentence of the Jones Act to venue in the judicial district in which the defendant employer resides or has his principal office. On the other hand, Sec. 6

of the F. E. L. A., 45 U. S. C. Sec. 56, gives an F. E. L. A. plaintiff an unqualified right to bring his action in any court, state or federal, where the liberal venue requirements of 45 U. S. C. Sec. 56 are met; this unqualified venue right is possessed by seamen only when they seek a state, not a federal, forum. Thus, since these plaintiffs are seamen seeking relief under the Jones Act in a state court, they possess venue rights identical to those that would be possessed by an F. E. L. A. plaintiff in a state forum. This raises the question of whether a state court of competent jurisdiction, with jurisdiction *in personam* over the defendants, as has the lower court in these cases, may dismiss under the doctrine of *forum non conveniens* a Jones Act or F. E. L. A. action where the venue of that action is properly laid under 45 U. S. C. Sec. 56. The correct answer to this question is that a state court lacks such power.

F. E. L. A. and Jones Act suits, because of their special venue provisions, present *forum non conveniens* problems entirely different from those encountered in the ordinary transitory action. The New Jersey Supreme Court has expressly recognized this difference. *Gore v. United States Steel,* 15 N. J. at 311-312 (1954).

Miles v. Illinois Central R. Co., 315 U. S. 698 (1942) was a case in which the United States Supreme Court was presented with an attempted application of the doctrine of *forum non conveniens* by a state court to an F. E. L. A. action. The widow of a Tennessee citizen who had been killed in Tennessee while in the employ of the defendant railroad caused an F. E. L. A. action to be brought in the State Courts of Missouri. The railroad sued the widow in Tennessee and secured an injunction against prosecution of the action in Missouri on the ground that it would be inconvenient and expensive for the railroad to defend the action in so distant a forum. The Supreme Court held that Congress, in enacting Sec. 6 of the F. E. L. A., 45 U. S. C. Sec. 56, had deprived Tennessee of power to enjoin prosecu-

tion of an F. E. L. A. action in another state by one of its citizens, even though that forum would be harrassing and inconvenient to the defendant:

> "As Congress has permitted both the state and federal suits, its determination that the carriers must bear the incidental burden is a determination that the state courts may not treat the normal expense and inconvenience of trial in permitted places, such as the one selected here, as inequitable and unconscionable." 315 U. S. at 705.

See also *Baltimore & Ohio R. Co. v. Kepner*, 314 U. S. 44 (1941) where the Court held that Sec. 6 of the F. E. L. A. deprives a state court of power to enjoin prosecution of an F. E. L. A. action in a distant federal forum.

The Supreme Court's interpretation of the broad reach of the *Miles* and *Kepner* cases was set forth in *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501 (1947). The *Gulf* case upheld the power in a federal district court to dismiss a case under the doctrine of *forum non conveniens*, where the venue of the action was governed by the general venue statutes. Of F. E. L. A. cases it was said:

> "It is true that in cases under the Federal Employers' Liability Act we have held that plaintiff's choice of a forum cannot be defeated on the basis of *forum non conveniens*. But this was because the special venue act under which those cases are brought was believed to require it. *Baltimore & Ohio R. R. v. Kepner*, 314 U. S. 44; *Miles v. Illinois Central R. R.*, 315 U. S. 698. Those decisions do not purport to modify the doctrine as to other cases governed by the general venue statutes." 330 U. S. at 505.

The *Miles* case was also mentioned in *United States v. Nat. City Lines*, 334 U. S. 573 (1948). That case involved the question whether the broad venue rights

given to plaintiffs by Sec. 12 of the Clayton Act, 15 U. S. C. Sec. 22, were subject to the doctrine of *forum non conveniens*. Section 12 permitted anti-trust civil actions to be brought in any judicial district in which the defendant transacted business. The Court held that these broad venue rights could not be impaired by dismissal under *forum non conveniens*. (This result was changed in 1948 after the enactment of 28 U. S. C. Sec. 1404(a). In *United States v. Nat. City Lines*, 334 U. S. 573 (1948). That case involved the question whether the broad venue rights given to plaintiffs by Sec. 12 of the Clayton Act, 15 U. S. C. Sec. 22, were subject to the doctrine of *forum non conveniens*. Section 12 permitted anti-trust civil actions to be brought in any judicial district in which the defendant transacted business. The Court held that these broad venue rights could not be impaired by dismissal under *forum non conveniens*. (This result was changed in 1948 after the enactment of 28 U. S. C. Sec. 1404(a). In *United States v. Nat. City Lines*, 337 U. S. 78 (1949) the Court held that civil anti-trust suits were subject to transfer under that section.) The Court examined the text of Sec. 12 and its legislative history and concluded with these significant observations:

> "Finally, both appellees and the District Court have placed much emphasis upon this Court's recent decisions applying the doctrine of *forum non conveniens* and in some instances extending the scope of its application. Whatever may be the scope of its previous application or of its appropriate extension, the doctrine is not a principle of universal applicability, as those decisions uniformly recognize. At least one invariable, limiting principle may be stated. It is that whenever Congress has vested courts with jurisdiction to hear and determine causes and has invested complaining litigants with a right of choice among them which is inconsistent with the exer-

cise by those courts of discretionary power to defeat the choice so made, the doctrine can have no effect. *Baltimore & Ohio R. Co. v. Kepner*, 314 U. S. 44; *Miles v. Illinois Central R. Co.*, 315 U. S. 698. The question whether such a right has been given is usually the crux of the problem. It is one not to be answered by such indecisive inquiries as whether the venue or jurisdictional statute is labeled a 'special' or a 'general' one. Nor is it to be determined merely by the court's view that applicability of the doctrine would serve the ends of justice in the particular case. It is rather to be decided, upon consideration of all the relevant materials, by whether the legislative purpose and the effect of the language used to achieve it were to vest the power of choice in the plaintiff or to confer power upon the courts to qualify his selection." 334 U. S. 596-597.

The *Miles* case remained as the supreme law of the land without a shadow being cast upon its continued vitality until the enactment, in 1948, of 28 U. S. C. Sec. 1404(a). That section provides:

"Sec. 1404. Change of Venue

"(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

It was not long before the Supreme Court was faced with the problem of resolving the sweep of this section with a plaintiff's venue rights under Sec. 6 of the F. E. L. A. In *Ex parte Collett*, 337 U. S. 55 (1949), and *Kilpatrick v. Texas & Pacific Railway Co.*, 337 U. S. 75 (1949), it was held that there was no conflict between the two statutes. In its discussion in *Ex parte Collett* the Court pointed out that "Prior to the current revision of Title 28 of the United States Code, *forum*

non conveniens was not available in Federal Employers' Liability Act suits." 337 U. S. at 57. The *Kepner, Miles* and *Gilbert* cases were cited in support of this proposition. Section 1404(a) was held not to effect an implied repeal of Sec. 6 of the F. E. L. A. Instead the statutes were reconciled on the basis that Sec. 6 still operated to permit the bringing of an action wherever the defendant railroad might be doing business, while 1404(a) comes into play on a motion to transfer only after Sec. 6 had entirely fulfilled its function of defining proper venue.

In its discussion in the *Collett* opinion the Court buttressed its conclusion that Sec. 1404(a) did not effect a repeal of Sec. 6 of the F. E. L. A. with references to the defeat of the Jennings Bill, H. R. 1639, 80th Cong., 1st Sess. See 337 U. S. at 61-71. The Jennings Bill would have amended Sec. 6 of the F. E. L. A. with a provision requiring all F. E. L. A. actions to be brought only in the "district court of the United States or in a state court of competent jurisdiction, in the district or county (parish), respectively, in which the cause of action arose, or where the person suffering injury or death resided at the time it arose. . . .". The Court said of the Jennings Bill:

> "The Jennings Bill and Sec. 1404(a) of the Code meet the same problem, the alleged abuses in the selection of forums for Liability Act suits. But the Jennings Bill was far more drastic than Sec. 1404(a). The Jennings Bill would in large part have repealed Sec. 6 of the Liability Act. *It would have delimited the available forum for actions brought in state as well as federal courts.*" 337 U. S. 63-64. (Emphasis supplied.)

On the emphasized sentence from the foregoing quotation the Court inferred that by defeating the Jennings Bill while enacting Sec. 1404(a) Congress intended to touch only venue rights in federal courts and Sec. 6 was to be left unimpaired in reference to F. E. L. A.

actions brought in state courts. This was the precise holding of the Court in 1953.

Pope v. Atlantic Coast Line R. Co., 345 U. S. 379 (1953), presented a factual situation identical to the *Miles* case, supra. A citizen and resident of Georgia was injured in Georgia while in the employ of the defendant railroad, a corporation of Virginia. Suit was brought under the F. E. L. A. in a state court of Alabama. The railroad then brought suit in Georgia asking that its employee be restrained from maintaining the Alabama suit. Relief was granted. But the Supreme Court reaffirmed the *Miles* case while holding that the courts of Georgia lacked power to enjoin the Alabama suit because it impaired the rights granted in Sec. 6 of the F. E. L. A.:

> "Section 6 of that Act establishes petitioner's right to sue in Alabama. It provides that the employee may bring his suit wherever the carrier 'shall be doing business', and admittedly respondent does business in Jefferson County, Alabama. Congress has deliberately chosen to give petitioner a transitory cause of action; and we have held before, in a case indistinguishable from this one, that Sec. 6 displaces the traditional 'power of a state court to enjoin its citizens, on the ground of oppressiveness. . . .from suing. . . .in the state courts of another state'. *Miles v. Illinois Central R. Co.*, supra, 315 U. S., at 699. Respondent admits that the *Miles* case dealt with precisely the issue before us, but respondent tells us that Miles is now no longer the law because Congress overruled it, by implication, with the passage of Sec. 1404(a) of the Judicial Code in 1948.
>
> * * * *
>
> "We have heretofore held that Sec. 1404(a) made the doctrine of *forum non conveniens* applicable to Federal Employers' Liability Act cases brought in federal courts and provides for the transfer of such

actions to a more convenient forum. *Ex parte Collett*, 337 U. S. 55 (1949). Respondent would have us extend that decision, to hold that 1404(a) also provides for the power asserted by the Georgia court in this case. We do not agree; we do not think the language of the statute suggests any such implied grant of broad power to the state courts." 345 U. S. 383-384.

* * * *

"Congress might have gone further; it might have vested state courts with the power asserted here. In fact, the same Congress which enacted Sec. 1404(a) refused to enact a bill which would have amended Sec. 6 of the Federal Employers' Liability Act by limiting the employee's choice of venue to the place of his injury or to the place of his residence.

"This proposed amendment—the Jennings Bill—focused Congress' attention on the decisions of this Court in both the *Miles* and the *Kepner* cases. The broad question—involving many policy considerations—of whether venue should be more narrowly restricted, was reopened; cogent arguments—both pro and con—were restated. Proponents of the amendment asserted that, as a result of the *Miles* and *Kepner* decisions, injured employees were left free to abuse their venue rights under Sec. 6 and 'harass' their employers in distant forums without restriction. They insisted that these abuses be curtailed. These arguments prevailed in the House, which passed the Jennings Bill, but the proposed amendment died in the Senate Judiciary Committee, and Sec. 6 of the Federal Employers' Liability Act was left just as this Court had construed it." 345 U. S. 386-387.

The *Pope* case represents the last attempt by employers in the United States Supreme Court to secure

through judicial decision what Congress denied them in refusing to enact the Jennings Bill. Congress plainly has said that plaintiffs under the F. E. L. A. shall have broad venue rights in both state and federal courts. The congressional policy decision has been that F. E. L. A. and consequently Jones Act plaintiffs are secure in whatever advantage these venue rights may bring. Courts are not free to impair these Congressionally granted rights by judicial decision. Such chipping away by a state court at a paramount federal right is forbidden by the supremacy clause, U. S. Const. Art. VI, cl. 2. *Testa v. Katt*, 330 U. S. 386 (1947). Under the *Pope* and *Miles* decisions the venue rights of Sec. 6 are subject to no exception when they are asserted in state courts. Under the *Collett* case Sec. 6, venue, once established in a federal court, may be changed by judicial action pursuant to 28 U. S. C. Sec. 1404 (a). But the transfer or change of venue permitted by Sec. 1404(a) is a far different thing from the dismissal the lower court has decreed under *forum non conveniens*. Section 1404(a) is really not *forum non conveniens*, but something entirely different. *Norwood v. Kirkpatrick*, 349 U. S. 29 (1955). When a court of the United States transfers an action under Sec. 1404(a) it is doing no more within its system than this Court would do in transferring a case under R. R. 1:27D. "The courts of the United States comprise one great system for the administration of justice." *Internatio-Rotterdam, Inc. v. Thomsen*, 218 F. 2d 514, 517 (4th Cir. 1955). Thus, it is easily apparent that the application of state *forum non conveniens* law by way of dismissal is a far greater inroad upon Sec. 6 venue rights than transfer from one federal court to another under Sec. 1404(a). It is quite rational for Congress to have permitted transfer of F. E. L. A. cases within the federal system while leaving unimpaired the cases which preclude states from applying *forum non conveniens* to F. E. L. A. and Jones Act cases. Those are the *Miles* and *Pope* cases, and they

deny to this Court the power which the defendants now ask it to exercise.

The *Pope* and *Miles* cases cannot be distinguished on the ground that in them injunctive relief against a troublesome suit in another forum was sought by the defendant in that suit in the courts of the state of the residence of the plaintiff. The foundation of *Pope* and *Miles* is the protection of the venue rights of F. E. L. A. plaintiffs. If Sec. 6 of the F. E. L. A. is so potent as to impair the traditional jurisdiction of an equity court to enjoin a vexatious foreign lawsuit, it would not be quite rational to permit, on the other hand, that same foreign lawsuit to be dismissed by the court in which it was brought for the identical reasons the equity court is forbidden to assert—inconvenience and harassment of the defendant, or that the case could more equitably be tried elsewhere.

Section 6 of the F. E. L. A. is not a dead letter on the pages of the United States Code. The *Pope* case is ample demonstration of this. Yet if Sec. 6 does not mean that state courts are forbidden to apply their local law of *forum non conveniens* to F. E. L. A. actions, it means very little. If Sec. 6 does not prohibit the relief the defendants request here, then its only function is to permit F. E. L. A. actions to be begun in a wide range of federal and state forums, with these actions subject to transfer in the federal system under Sec. 1404(a) and dismissal in the state courts under *forum non conveniens*. Such a result is inconsistent with Congressional and Supreme Court policy to protect zealously a plaintiff's choice of forum in F. E. L. A. suits. Congress has specifically forbidden F. E. L. A. actions begun in a state court to be removed to the appropriate federal court on diversity or federal question grounds. 28 U. S. C. Sec. 1445. This provision, which formerly was a part of Sec. 6 of the F. E. L. A., formed one reliance for the decision in the *Miles* case. 315 U. S. at 702. The high regard in which a plaintiff's right to select his forum in F. E. L. A. suits is held

is further evidenced by *Boyd v. Grand Trunk W. R. Co.*, 338 U. S. 263 (1949) in which it was held that a contract between an employer and employee in which the employee waived part of his broad forum-selecting rights under Sec. 6 was void as in conflict with the policies expressed in the F. E. L. A. Moreover, if state courts are permitted to dismiss F. E. L. A. suits on the basis of their own *forum non conveniens* law, such a result would thwart a clearly-expressed Supreme Court policy of obtaining the maximum possible procedural uniformity in the administration of F. E. L. A. suits in state courts. *Dice v. Akron, C. & Y. R. Co.*, 342 U. S. 359 (1952); *Brown v. Western R. Co. of Alabama*, 338 U. S. 294 (1949). For if Sec. 6 does not prevent the application of state *forum non conveniens* law to state court actions brought under the F. E. L. A., then F. E. L. A. suits would be subject to *forum non conveniens* dismissal in state courts not by any uniform standard but according to the vagaries of local *forum non conveniens* law.

Placing heavy reliance upon *Southern R. Co. v. Mayfield*, 340 U. S. 1 (1950), defendants will deny that the lower Court lacks power to dismiss these cases under *forum non conveniens*. The *Mayfield* case, say defendants, show that state courts may dismiss F. E. L. A. and Jones Act cases under local *forum non conveniens* law despite the broad venue rights given suitors under these acts by Sec. 6 of the F. E. L. A.

We adhere to our position that a state court lacks power to dismiss an F. E. L. A. or Jones Act case under *forum non conveniens* because of the interdiction of Sec. 6 of the F. E. L. A. This is a result logically flowing from the *Miles* and *Pope* case which we previously have discussed. *Mayfield* does not change this result. That was a 5-4 decision decided more than three years before *Pope*. There the Supreme Court of Missouri had refused to dismiss an F. E. L. A. case. Whether it refused to dismiss upon application of its own law of *forum non conveniens* or whether it refused to dismiss because it thought that the *Miles* and *Kepner* de-

cisions prevented application of state law of *forum non conveniens* to F. E. L. A. suits was not clear to the majority in the United States Supreme Court. In an opinion vacating the judgment and remanding the case to the Supreme Court of Missouri, the Court seemed to say that states could validly apply their local law of *forum non conveniens* to F. E. L. A. suits. But the underpinning of the *Mayfield* case has been cut away by *Pope v. Atlantic Coast Line R. Co.*, 345 U. S. 379 (1953). *Mayfield* was a 5-4 decision, and the deciding vote was cast by the late Justice Jackson. In a concurring opinion he wrote that "By amendment, 28 U. S. C. Sec. 1404(a), as interpreted in *Ex parte Collett*, 337 U. S. 55, Congress has removed the compulsion which determined the *Miles* case, and the Missouri Court should no longer regard it as controlling." 340 U. S. 5. The majority opinion in the *Mayfield* case itself rests in part on radiations from the enactment of Sec. 1404(a). But as the *Pope* case shows, 1404(a) has absolutely no effect on the result in *Miles*. If the deciding vote in *Mayfield* rests on the theory that 1404 (a) undermined *Miles*, then the *Pope* case shows that *Mayfield* today would not command a majority of the Court. It is also not amiss to note that it was Justice Frankfurter who wrote for the Court in *Mayfield* and it does not lend authority to his views of this problem to point out that he was in dissent in *Kepner* and *Miles* and was the lone dissenter in *Pope*. If the *Mayfield* case purports to say that states may apply their local law of *forum non conveniens* to F. E. L. A. actions despite Sec. 6 of that act, then the case can no longer be deemed controlling in view of the closeness of its vote and the subsequent decision in *Pope v. Atlantic Coast Line R. Co.*, supra. For if states may apply their law of *forum non conveniens* to F. E. L. A. cases, then there could have been no rational purpose in the Supreme Court's zealous protection of Sec. 6 venue rights in *Miles* and *Pope*.

The prevailing spirit of the statutes and cases dealing with forum selection under the F. E. L. A. points clearly to the conclusion that state courts are precluded by Sec. 6 of the Federal Employers' Liability Act from applying their local law of *forum non conveniens* to F. E. L. A. and Jones Act suits brought before them.

POINT II

The Doctrine of Forum Non Conveniens Contemplates the Existence of at Least Two Forums in Which the Defendant is Amenable to Involuntary Service of Process.

The doctrine of *forum non conveniens* is one under which a court having jurisdiction of the parties and the subject matter and in which venue has been properly laid may, in the interests of basic justice, refuse to exercise that jurisdiction where there is another available forum in which the case can be more conveniently tried. *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501 (1947); *Gore v. United States Steel Corp.*, 15 N. J. 301 (1954). An essential prerequisite to application of the doctrine by the court before which a controversy is brought is that there must be another available forum whose selection would better serve the ends of justice. *Gilbert, supra*, 330 U. S. at 506-507; *Gore, supra*, 15 N. J. at 305. And under true *forum non conveniens* the traditional right of a plaintiff to choose from among the available forums is entitled to great respect. This was pointed out in Justice Jackson's opinion in *Gulf Oil Corp. v. Gilbert, supra*, as he described some of the criteria for decision under *forum non conveniens:*

> "Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious, and inexpensive. There may also be questions as to the enforcibility of a judgment if one is obtained. The Court will weigh relative advantages and obstacles to a fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum,

'vex', 'harass', or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. *But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.*" 330 U. S. at 508. (emphasis supplied). (quoted in *Gore v. U. S. Steel*, 15 N. J. at 306).

True *forum non conveniens* must be distinguished from the standards applied in determining whether a case should be transferred from one federal court to another under 28 U. S. C. Sec. 1404(a). In its earlier opinions construing Sec. 1404(a) the Supreme Court referred to that statute as embodying the doctrine of *forum non conveniens*. See *Ex parte Collet*, 337 U. S. 55 (1949); *United States v. National City Lines*, 337 U. S. 78 (1949); *Pope v. Atlantic Coast Line R. Co.*, 345 U. S. 379 (1953). But in 1955 the Court conceded that such a description of Sec. 1404(a) was not accurate. The Court said in *Norwood v. Kirkpatrick*, 349 U. S. 29, 32 (1955):

> "When Congress adopted Sec. 1404(a), it intended to do more than just codify the existing law on *forum non conveniens*. As this Court said in *Ex parte Collett*, 337 U. S. 55-61, Congress, in writing Sec. 1404 (a), which was an entirely new section, was revising as well as codifying. The harshest result of the application of the old doctrine of *forum non conveniens*, dismissal of the action, was eliminated by the provision in Sec. 1404(a) for transfer. When the harshest part of the doctrine is excised by statute, it can hardly be called mere codification. As a consequence, we believe that Congress, by the term "for the convenience of parties and witnesses, in the interest of justice," intended to permit courts to grant transfers upon a lesser showing of inconvenience. This is not to say that the relevant factors have changed or that the plaintiff's choice of forum is not to be considered, but only that the discretion to be exercised is broader."

Thus it can readily be seen that defendants' reliance on precedents decided under Sec. 1404(a) is misplaced, for in this case the law of New Jersey to be applied is pure *forum non conveniens*, unmodified by a mitigating statute such as Sec. 1404(a). The *Gore* case also relied in part on cases decided under Sec. 1404(a), but *Gore* was decided before *Norwood v. Kirkpatrick*.

Pure *forum non conveniens* law gives greater emphasis to plaintiff's choice of forum than do the cases under Sec. 1404(a). One obvious reason why this is so is that the harsh remedy of dismissal should be applied only where it is clear that the defendant will be unduly prejudiced by litigation in the court selected by the plaintiff. But there is a more subtle reason why a state court should not apply its law of *forum non conveniens* in such a manner that it dismisses every case that, if started in the federal court a block or two away, would probably be transferred to another federal forum under Sec. 1404(a). A case that is transferred from one federal district to another may reach the transferee district carrying the law from the transferor district with it as the law of the case. For example, in *Headrick v. Atchison, T. & S.F. Ry. Co.*, 182 F. 2d 305 (10th Cir. 1950), the plaintiff, a citizen and resident of Missouri, sued the defendant, a corporation of Kansas, in a New Mexico state court for injuries sustained while he was a passenger in California on a bus owned by the defendant. The railroad removed the case to the United States District Court for the District of New Mexico on the ground of a diversity of citizenship, and then moved to have the case dismissed under *forum non conveniens* or in the alternative transferred to California under Sec. 1404(a). It appeared that the New Mexico statute of limitations which governed personal injury actions and which obtained in the federal court in New Mexico was two years. The California statute of limitations was one year, and under the California statute the plaintiff would have been barred from bringing his action. The trial judge thought that a transfer to California would have been futile in view of the one-year

statute of limitations prevailing there, and dismissed the complaint under *forum non conveniens*. The Court of Appeals reversed. It was held that a transfer under Sec. 1404(a) would not have been an impotent act. The Court would not permit a transfer under Sec. 1404(a) to deprive a plaintiff of substantial legal rights acquirable only in the transfer forum, and said that the case when transferred to California would go there carrying with it New Mexico's two-year statute of limitations. The *Headrick* result could not occur in a case dismissed under *forum non conveniens* in a state court and then begun as a completely new case in a distant state or federal forum. These different incidents of transfer under Sec. 1404(a) are cogent reasons why state courts should not follow the precedents created under that section when exercising their power to dismiss under *forum non conveniens*.

Defendants rely heavily on *Gore v. United States Steel Corp.*, 15 N. J. 301 (1954). Some of the factors weighed by the court in *Gore* are present in these cases. But there are very significant differences. A factor that counted heavily in the decision to apply forum non conveniens in the *Gore* case was the fact that New Jersey's courts were being asked to apply Alabama law:

> "The briefs before us suggest various questions of Alabama law, statutory and otherwise, which will be presented at the trial and may more readily be passed upon by an Alabama court." 15 N. J. at 312.

The Superior Court of New Jersey, however, cannot rightly be deemed less competent to apply federal law than courts in Puerto Rico. In conferring upon state courts jurisdiction concurrent with the federal district courts in Jones Act and F. E. L. A. suits Congress has specifically determined that the courts of the states, including those of New Jersey, are fully capable of applying these federal statutes.

As was pointed out above, pure *forum non conveniens*

law presupposes at least two available forums in which the plaintiff might have instituted suit. In the *Gore* case there was no question that the defendant, United States Steel, was subject to suit in Alabama, for it had a plant there at which the plaintiff's husband had been killed. In other words it was beyond doubt that United States Steel was at all times subject to jurisdiction *in personam* in Alabama.

The defendants here project Puerto Rico as the more convenient forum. They say they will voluntarily appear in Puerto Rico. That is not enough. They tell this Court nothing to show that they were subject to involuntary *in personam* jurisdiction in Puerto Rico at the same time these plaintiffs began their Jones Act suits in New Jersey. They do not say, for example, that they do business on the mainland of Puerto Rico, or that they have an agent for service of process there. The three accidents out of which these suits arose occurred in ships owned by the defendants anchored in navigable waters off the Puerto Rican mainland. The defendants are the movants and they carry the burden of showing that the plaintiffs had available a more convenient forum in Puerto Rico but instead chose to harass them by suit in New Jersey. The availability of Puerto Rico as a forum for these plaintiffs hinges, in turn, upon the amenability to service of process of these defendants in that territory. Unless the defendants can show plainly that these plaintiffs could have just as easily haled them into the Puerto Rican courts, they cannot complain that the plaintiffs have selected the forum of their corporate domicile in which to bring suit.

In the *Gore* case there was no doubt that a judgment against United States Steel rendered by an Alabama court could easily have been satisfied in Alabama. The presence in Alabama of the Factory at which the death of plaintiff's husband occurred provided ample evidence that United States Steel had valuable assets in that state. The defendants here do not say that they have

assets on the mainland of Puerto Rico. It is said that their ships travel between the United States and ports in Puerto Rico. But it may be that all defendants' ships do not reach the Puerto Rican mainland, and instead unload their cargo to barges somewhere off the mainland. In any event, defendants as movants have the burden of showing that a judgment could be at least as easily satisfied in Puerto Rico as in New Jersey. Plainly, they have not shown this.

In point one of this brief it was demonstrated that under the Jones Act, 46 U. S. C. Sec. 688, the only proper venue for a Jones Act case brought in the federal judicial system is in either the judicial "district in which the defendant employer resides or in which his principal office is located." *Bainbridge v. Merchants and Miners Co.*, 287 U. S. 278 (1932). Thus, if these plaintiffs had wished to sue in a federal court they would have been restricted to two forums: the federal court in New Jersey, the "residence" of their corporate employers, or the federal judicial district of the place where their principal office is located. The defendants have not made known on the present record the location of their principal office, but it does not appear to be Puerto Rico. Thus, plaintiffs are forbidden to bring their suits in the federal court in Puerto Rico under the Jones Act. They are limited to the federal court of New Jersey and the federal court embracing the principal office of these corporations. It would be incongrous indeed if this court were to dismiss these cases on the ground that New Jersey is an inconvenient place for the defendants to litigate only to have these plaintiffs go a few blocks away and begin their suits as a matter of right in the United States District Court for the District of New Jersey. In effect, Congress has already said that New Jersey is not an inconvenient place in which to try these suits.

This court should not be swayed by argument that once these cases are begun in the federal court in New Jersey they would probably be transferred to Puerto

Rico under Sec. 1404(a). The dangers of parelleling state court dismissals under *forum non conveniens* with federal court transfers under Sec. 1404(a) have already been discussed. Moreover, should these cases be in the federal court, the power of that court to transfer them to Puerto Rico under Sec. 1404(a) is in serious doubt. Section 1404(a) provides:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division *where it might have been brought.*"
> (emphasis supplied.)

The exact limitations of the concept "where it might have been brought" is now subject to some dispute in the federal courts. See Kaufman, *Further Observations on Transfers Under Section 1404(a)*, 56 Columbia Law Rev. 1, 13 (1956). But it is significant that Judge Irving Kaufman, writing just a year ago in the Columbia Law Review, could cite no federal case which permitted the transfer of an action under Sec. 1404(a) to a transferee forum which lacked proper venue. Under the Jones Act the federal court in Puerto Rico would not have venue of these actions because Puerto Rico is not the federal judicial "district in which the defendant employer resides or in which his principal office is located." Puerto Rico does not supply a forum where these cases "might have been brought" within the meaning of Sec. 1404(a).

For purposes of this portion of our argument we may assume, *arguendo*, that the F. E. L. A. or Jones Act is in no way involved and we may look at these three cases just as though they were ordinary transitory actions unencumbered by the special venue rights granted to F. E. L. A. and Jones Act suitors.

We now know that these cases could not have been begun in Puerto Rico. It may safely be assumed that defendants were not subject to involuntary service of process in Puerto Rico at the time these suits were

begun. Yet it is a fundamental axiom of *forum non conveniens* law that the defendant be amenable to service of process in the forum which he alleges to be the more convenient one:

> "In all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them." *Gulf Oil Corp. v. Gilbert, supra,* 330 U. S. at 506-507.

This principle is even more forcefully expressed in *Tivoli Realty v. Interstate Circuit,* 167 F. 2d 155 (5th Cir. 1948) cert. denied 334 U. S. 837 (1948):

> "The doctrine of forum non conveniens furnishes the criteria for choice between two or more forums in which the defendant is amenable to process. At least two such forums must be open to the plaintiff before the doctrine comes into play; and they shall not be dependent merely upon the will or grace of the defendant, but must be provided by law." 167 F. 2d at 156-157.

Gore v. United States Steel, supra, makes it clear that dismissal under *forum non conveniens* is a proper result only where a plaintiff has deliberately chosen the most vexatious of two or more available forums. In that case the Court said:

> "It is undisputed that in Alabama the defendant is fully amenable to service and the satisfaction of any judgment obtained against it." 15 N. J. at 312.
>
> * * *
>
> "In the instant matter we consider the undisputed facts to be entirely compelling; the plaintiffs should justly have instituted their action in a court sitting in Alabama and we find no proper reason for their having chosen or being permitted

to remain in this forum." 15 N. J. at 313.

These appeals may properly be decided upon application of the simple rule that a dismissal under *forum non conveniens* results only where a plaintiff unjustly chooses an inconvenient forum from among those available. Plaintiffs had no other choice but New Jersey. Since they could not serve defendants in Puerto Rico, they could not institute suit there. Being forced to bring suit in one of the states, what state would be more appropriate and convenient than the state of the defendants corporate domicile? It was pointed out in *Tivoli Realty v. Interstate Circuit*, *supra*, that "It is a fair inference that ordinarily one's domicile is not an inconvenient place for one to be sued." 167 F. 2d at 157. As a matter of practical reality, suit brought in any other state would run a substantial risk of being dismissed under *forum non conveniens* because it would be an action between non-residents arising out of a foreign tort.

Defendants' assurances that they will appear voluntarily in Puerto Rico should not change the result. If accepted, and used as a basis for dismissal, such action would be a perversion of the doctrine of *forum non conveniens*. The doctrine is a device which prevents unjust harassment of a defendant by a plaintiff's vexatious choice of forum. If these defendants can secure dismissal of these three cases on the ground that they agree voluntarily to appear in Puerto Rico, it means that plaintiffs, in order to maintain their cause of action, must first retain counsel in New Jersey to begin the case and carry it through complicated pretrial procedures such as this in order to obtain consent of defendants to appear in Puerto Rico, and then must retain counsel in Puerto Rico to try the case. Plaintiffs need, therefore, to retain two lawyers and begin two lawsuits in order to effect one recovery. Such a result would be twisting a doctrine originally designed to do justice to defendants into an instrument of oppression of plaintiffs. It

would run directly counter to the concept of elemental justice that moved the Supreme Court in the *Gore* case.

It will be noted that Paragraph 1(a) of the order of dismissal (P42a-31), provides that the defendant shall accept service of the summons and complaint and shall appear in such action. Let us assume that they do so in the courts of Puerto Rico, and let us further assume that these cases finally come to a point where judgment is rendered against the respective defendants for the cause of actions alleged in the complaints. Might not the defendants at that time suggest to the court in Puerto Rico that the action of the corporation in accepting service of summons and complaint and appearing in such action is an ultra vires act of the corporation, not having been approved by the Stockholders or the Board of Directors of the respective corporations and in the event they were successful in this regard, then all of the work and the judgments entered in the courts of Puerto Rico would be of no avail to the plaintiffs in these actions. Under the order of dismissal, therefore, in such an event, these plaintiffs would be again relegated to the courts of New Jersey where they would have to institute new suits or at least set aside the order of dismissal in accordance with its terms and then continue to prove its case before a jury which jury might if it so determines, find a verdict in favor of the defendants, thus putting the plaintiffs herein to two expensive litigations in order to get a final determination of their rights under their complaints. If the defendants claim they are being harassed by the institution of these suits in the courts of New Jersey, then in such an event, would not the plaintiffs be more harassed by being forced to go through two expensive trials in order to get a final determination of their causes of action.

It will be noted that the opinion (P41a-17), and the order of dismissal (P43a-20), both provide for a counsel fee in each of the cases to the plaintiffs in the sum of $200.00. There is no provision in our present Rules of

Court, R. R. 4:55-7, which provides for the payment or the award of a counsel fee in any actions like the present ones. This action on the part of the lower court can be ascribed only to the fact that the lower court was indecisive of its decision and in an attempt to assuage the plaintiffs, made provision for the payment of these counsel fees. Of course it can be contended that the court in order to advance justice has relaxed the Rules of the Court pursuant to R. R. 1:27A. The plaintiffs, however, would rather believe that the lower court was indecisive in its determination and in order to assuage the plaintiffs for the time and effort put forth by their attorney in the preparation of voluminous briefs and argument, allowed the counsel fee not only in its opinion but also followed it up in the order of dismissal.

CONCLUSION

Sec. 6 of the F. E. L. A. grants broad venue rights which may not be impaired by application of state *forum non conveniens* law. These are not cases wherein Congress is interfering with the jurisdiction of state courts. *Forum non conveniens* is not jurisdictional. This court has subject matter jurisdiction over these personal injury actions, and all Sec. 6 does is forbid this court to refuse to exercise that jurisdiction.

Under New Jersey's own law of *forum non conveniens* these cases may not be dismissed. The doctrine contemplates the existence of at least two forums in which the defendant is amenable to involuntary service of process and in which the venue is proper. It comes into play only when the plaintiff, without justification, chooses from among the available forums one harassing to the defendant. This is not the situation here, for defendants are not amenable to involuntary service of process in Puerto Rico, the forum the defendants say

is more convenient, and New Jersey, the domicile of both corporate defendants, in the most convenient of the available forums.

State courts should not equate dismissals under their local law of *forum non conveniens* with federal court transfers under 28 U. S. C. Sec. 1404(a). Such a practice would convert *forum non conveniens* from a doctrine designed to do justice to defendants into one of oppression of plaintiffs. Furthermore, dismissals involve such harmful legal results to a plaintiff's cause of action in comparison with a 1404(a) transfer within the same judicial system, that it would be unjust to make the discretion to dismiss under *forum non conveniens* as broad as the discretion to transfer under Sec. 1404(a).

The *Gore* case does not require application of *forum non conveniens* here. The factual and legal situations presented by these cases is substantially different from that which dictated dismissal in *Gore*.

For all of the foregoing reasons, it is respectfully submitted that the judgments of dismissal be reversed.

Respectfully submitted,

SAMUEL M. COLE
Attorney for Plaintiffs.

LOUIS J. GREENBERG,
On the Brief.

APPENDIX

Superior Court of New Jersey
Law Division, Essex County
Docket No. L837-56

ANGEL PAIN VARGAS,
Plaintiff,

vs.

A. H. BULL STEAMSHIP CO.,
Defendant

COMPLAINT
(Filed 10/1/56)

(Plaintiff demands jury trial)

Plaintiff, residing in the free state, affiliated with the United States, known as Puerto Rico, complaining of the defendant herein, says:

1. The defendant, A. H. Bull Steamship Co., is a corporation of the State of New Jersey, having its principal office at 11 Commerce Street, in the City of Newark, County of Essex and State of New Jersey.

2. This action arises and jurisdiction is invoked pursuant to Section 46 U. S. Code 688, commonly known as the Jones Act.

3. Said Jones Act confers concurrent jurisdiction on State, as it does on the Federal Courts.

4. At all times hereinafter mentioned, defendant was the employer of the plaintiff in defendant's business as owner and operator of a certain vessel known as the SS JEAN.

5. At all times hereinafter mentioned, defendant owned, managed, controlled and operated the aforesaid vessel.

Complaint

6. On or about the 30th day of March, 1955, while the plaintiff was carefully, properly and prudently engaged in the performance of his duties aboard the aforesaid vessel as a business invitee and as an agent, servant or employee of the defendant, he was caused to be severely injured, as hereinafter more particularly described, by reason of the defendant's negligence as set forth herein.

7. The aforesaid occurrence was due solely to the carelessness, recklessness and negligence of the defendant, its agents, servants and employees; the fault, neglect and omission of officers and fellow seamen aboard the vessel; the failure, neglect and omission of the defendant to keep and maintain the aforesaid vessel and its appurtenances in a seaworthy condition; in defendant's failure to take any means or precautions for the safety of the plaintiff; in failing to provide the plaintiff with a reasonably safe place wherein to work, in that, on or about the 30th day of March, 1955, while plaintiff was carefully, properly and prudently engaged in the pursuit of his duties aboard the vessel aforementioned, he was caused to slip and fall by reason of the condition of the deck which was in an unseaworthy condition due to the same being encumbered, greasy, slippery and not reasonably safe for the purpose intended, that in addition to the unseaworthiness aforementioned, the defendant was guilty of negligence in causing, allowing and permitting the aforesaid condition to be created and maintained without taking any means or precautions to remedy or rectify the same, and by reason of the unseaworthiness or negligence, either or both, the plaintiff was caused to slip, trip and otherwise lose his balance and fall, suffering the injuries hereinafter more particularly described.

8. By reason of the foregoing, plaintiff was caused to suffer injuries to his person, which, upon information and belief, may be permanent, and plaintiff was incapacitated

from attending to his usual duties, pursuits, economic, athletic and social, and plaintiff suffered pecuniary loss and other injuries.

9. By reason of the foregoing and by reason of the fact that plaintiff was injured aboard a merchant vessel which was engaged in maritime service, and by reason of the fact that said vessel was American-owned, and by reason of the fact that this action is predicated on the negligence of said defendant, its agents, servants and employees, plaintiff is entitled to the benefits of the aforesaid Jones Act.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of $25,000.00, together with costs and disbursements of this action.

SAMUEL M. COLE
Attorney for Plaintiff

Superior Court of New Jersey
Law Division, Essex County
Docket No. L800-56

FELIPE ALMESTICA,
Plaintiff,

vs.

BALTIMORE INSULAR LINE, INC.,
Defendant.

COMPLAINT

(Filed 10/1/56)

(Plaintiff demands jury trial)

Plaintiff, residing in the free state, affiliated with the United States, known as Puerto Rico, complaining of the defendant herein, says:

1. The defendant, Baltimore Insular Line, Inc., is a corporation of the State of New Jersey, having its principal office in the City of Newark, County of Essex and State of New Jersey.

2. This action arises and jurisdiction is invoked pursuant to Section 46 U. S. Code 688, commonly known as the Jones Act.

3. Said Jones Act confers concurrent jurisdiction on State, as it does on the Federal Courts.

4. At all times hereinafter mentioned, defendant was the employer of the plaintiff in defendant's business as owner and operator of a certain vessel known as the SS CAROLYN.

5. At all times hereinafter mentioned, defendant owned, managed, controlled and operated the aforesaid vessel.

6. On or about the 1st day of December, 1955, while the plaintiff was carefully, properly and prudently engaged in the performance of his duties aboard the afore-

said vessel as a business invitee and as an agent, servant or employee of the defendant, he was caused to be severely injured, as hereinafter more particularly described, by reason of the defendant's negligence as set forth herein.

7. The aforesaid occurrence was due solely to the carelessness, recklessness and negligence of the defendant, its agents, servants and employees; the fault, neglect and omission of officers and fellow seamen aboard the vessel; the failure, neglect and omission of the defendant to keep and maintain the aforesaid vessel and its appurtenances in a seaworthy condition; in defendant's failure to take any means or precautions for the safety of the plaintiff; in failing to provide the plaintiff with a reasonably safe place wherein to work, in that, on or about the 1st day of December, 1955, the footing was dangerous and unsafe for the purpose intended because of the condition of the cargo and as a result of the cargo being stowed in a careless, dangerous and slippery condition, and in addition to the unseaworthy condition aforementioned, the defendant was guilty of negligence in causing, allowing and permitting the aforesaid condition to be created and remain without taking any means or precautions to rectify the same, thereby failing to provide the plaintiff with a reasonably safe place wherein to work, all of which resulted in the plaintiff's being thrown off balance, losing his footing and falling, suffering the injuries complained of, and the defendant was otherwise guilty of fault.

8. By reason of the foregoing, plaintiff was caused to suffer injuries to his person, which, upon information and belief, may be permanent, and plaintiff was incapacitated from attending to his usual duties, pursuits, economic, athletic and social, and plaintiff suffered pecuniary loss and other injuries.

Complaint

9. By reason of the foregoing and by reason of the fact that plaintiff was injured aboard a merchant vessel which was engaged in maritime service, and by reason of the fact that said vessel was American-owned, and by reason of the fact that this action is predicated on the negligence and carelessness of the defendant, its agents, servants and employees, plaintiff is entitled to the benefits of the aforesaid Jones Act.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of $75,000.00, together with costs and disbursements of this action.

SAMUEL M. COLE
Attorney for Plaintiff

Superior Court of New Jersey
Law Division, Essex County
Docket No. L-825-56

JUAN ECHEVARRIA RODRIGUEZ,
Plaintiff,

vs.

A. H. BULL STEAMSHIP CO.,
Defendant.

COMPLAINT
(Filed 12/1/56)

(Plaintiff demands jury trial)

Plaintiff, residing in the free state, affiliated with the United States, known as Puerto Rico, complaining of the defendant herein, says:

1. The defendant, A. H. Bull Steamship Co., is a corporation of the State of New Jersey, having its principal office at 11 Commerce Street, in the City of Newark, County of Essex and State of New Jersey.

2. This action arises and jurisdiction is invoked pursuant to Section 46 U. S. Code 688, commonly known as the Jones Act.

3. Said Jones Act confers concurrent jurisdiction on State, as it does on the Federal Courts.

4. At all times hereinafter mentioned, defendant was the employer of the plaintiff in defendant's business as owner and operator of a certain vessel known as the SS ELIZABETH.

5. At all times hereinafter mentioned, defendant owned, managed, controlled and operated the aforesaid vessel.

6. On or about the 3rd day of September, 1954, while the plaintiff was carefully, properly and prudently en-

gaged in the performance of his duties aboard the aforesaid vessel as a business invitee and as an agent, servant or employee of the defendant, he was caused to be severely injured, as hereinafter more particularly described, by reason of the defendant's negligence as set forth herein.

7. The aforesaid occurrence was due solely to the carelessness, recklessness and negligence of the defendant, its agents, servants and employees; the fault, neglect and omission of officers and fellow seamen aboard the vessel; the failure, neglect and omission of the defendant to keep and maintain the aforesaid vessel and its appurtenances in a seaworthy condition; in defendant's failure to take any means or precautions for the safety of the plaintiff; in failing to provide the plaintiff with a reasonably safe place wherein to work, in that, on or about the 3rd day of September, 1954, a certain winch aboard the aforesaid vessel and the parts and appurtenances thereof were in such condition as to render the winch incapable of responding to control in an efficient and workmanlike manner so as to constitute said winch and its appurtenances reasonably fit for the purpose intended, and the vessel was further unseaworthy in that the ship failed to provide adequately trained and proper personnel to supervise the operation of the winch, to operate the winch, and to give adequate signals; and that in addition to the unseaworthiness aforementioned, the defendant was guilty of negligence in causing, allowing and permitting the winch, its gear and appurtenances to be and remain in a poor, defective and dangerous condition, out of order and repair, without taking any means or precautions to rectify the same, and defendant was guilty of further negligence in failing to furnish sufficient and adequate supervision over the operation of said winch, and sufficient, adequate and proper personnel to operate said winch and to give adequate signals for its operation;

that by reason of the unseaworthiness and negligence aforementioned, either or both, the plaintiff was caused to suffer the injuries hereinafter more particularly described when a crate or other object fell from a pallet which was being raised by said winch, and came in sudden, forceful and violent contact with the person of the plaintiff, and the defendant was guilty of other fault in that said pallet was so loaded with cargo, and so rigged and handled without adequate supervision by a ship's officer as to constitute an unseaworthy condition; that in addition to the unseaworthy condition aforementioned, the defendant was negligent in permitting the aforesaid condition to be created and maintained, thereby failing to provide the plaintiff with a reasonably safe place wherein to work.

8. By reason of the foregoing, plaintiff was caused to suffer injuries to his person, which, upon information and belief, may be permanent, and plaintiff was incapacitated from attending to his usual duties, pursuits, economic, athletic and social, and plaintiff suffered pecuniary loss and other injuries.

9. By reason of the foregoing and by reason of the fact that plaintiff was injured aboard a merchant vessel which was engaged in maritime service, and by reason of the fact that said vessel was American-owned, and by reason of the fact that this action is predicated on the negligence of the defendant, its agents, servants and employees, plaintiff is entitled to the benefits of the aforesaid Jones Act.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of $100,000.00, together with costs and disbursements of this action.

SAMUEL M. COLE
Attorney for Plaintiff

Superior Court of New Jersey
Law Division, Essex County
Docket No. L-837-56

ANGEL PAIN VARGAS,
Plaintiff,

vs.

V. H. BULL STEAMSHIP CO.,
Defendant.

MOTION TO DISMISS COMPLAINT
(Filed 10/22/56)

TO: SAMUEL M. COLE, ESQ.
Attorney for Plaintiff
586 Newark Avenue
Jersey City 6, New Jersey

SIR:

TAKE NOTICE that on Friday, the 2nd day of November, 1956, we shall apply to the above stated Court at the Court House, in the City of Newark, Essex County, New Jersey at 9:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order dismissing the above action on the following grounds:

1. The plaintiff is a resident of the Commonwealth of Puerto Rico.

2. The accident out of which the said cause of action arose, occurred in the Commonwealth of Puerto Rico or on a vessel moored in territorial waters at the Port of Ponce, Puerto Rico.

3. The defendant pledges itself to voluntarily appear in any action which may be brought against it in Puerto Rico.

4. All the witnesses, together with the medical and work records, required at the trial, are residents of the

Commonwealth of Puerto Rico and are subject to subpoena by its courts and by the United States District Court for Puerto Rico and are not subject to subpoena or answerable to process issuing out of the Superior Court of New Jersey.

5. The expense to the parties and the inconvenience to, and loss of time by, the witnesses will be burdensome and substantially heavier if the case is tried in New Jersey rather than in Puerto Rico.

6. The suit is one in which the Court should apply the doctrine of *forum non conveniens*.

Upon said motion the defendant will rely on the complaint filed herein and the annexed affidavit, together with the brief filed herewith.

Dated: October 22, 1956.

Yours respectfully,

McCarter, English & Studer /s/
McCARTER, ENGLISH & STUDER
Attorneys for Defendant.

Affidavit

STATE OF NEW YORK)
: SS.
COUNTY OF NEW YORK)

WILLARD A. KIGGINS, JR., being duly sworn, according to law, upon his oath, deposes and says:

1. I am President of the A. H. Bull Steamship Co., defendant in the above entitled action. Said steamship company is a corporation of the State of New Jersey. It has no property in New Jersey except its stock and transfer books.

2. Defendant operates a fleet of freight vessels. Its activities are far flung. It does a large shipping business between ports on the Atlantic Coast of the United States and ports in Puerto Rico. Vessels time-chartered from defendant, A. H. Bull Steamship Co., regularly go from the United States to the Commonwealth of Puerto Rico. These vessels do not call at ports in the State of New Jersey.

3. Plaintiff, as appears from his Complaint, is a resident of Puerto Rico. His address is Barriada Caribe 74, Playa de Ponce, Puerto Rico.

4. The alleged accident to the plaintiff for which he seeks damages in this action occurred at Ponce, Puerto Rico on March 30, 1955. At that time, plaintiff was working as a longshoreman in the employ of Bull Insular Line on the SS Jean.

5. All of the witnesses to the said accident reside at Playa de Ponce, Puerto Rico. Said Playa de Ponce is upwards of 1500 nautical miles distant from Newark, New Jersey, and in order to travel from one place to the other it is necessary to go either by airplane or freight ship. There is no ship passenger service.

6. As stated above all the witnesses reside in Puerto Rico. These witnesses are: Jose Antonio Diaz, whose address is Street No. 5, Barrio Limpio, Playa de Ponce, and Rafael Cordero, whose address is Street No. 4, #14, Playa de Ponce. In addition, the plaintiff was treated by Doctors of the State Insurance Fund of the Commonwealth of Puerto Rico, which Doctors reside in Puerto Rico, and by a Dr. J. A. Iguina, who also resides in Puerto Rico. The applicable medical and work records are all in Puerto Rico. None of the said witnesses is subject to process of subpoena or other compulsory process issuing out of the Superior Court of New Jersey, but is subject to subpoena or compulsory process issued only in the Commonwealth of Puerto Rico. The alleged accident occurred within the jurisdiction of the Commonwealth of Puerto Rico.

7. If the said action is to be tried in the Superior Court of New Jersey it will entail heavy expense to both the defendant and the plaintiff. The inconvenience to witnesses and loss of time by witnesses will be burdensome to them if the case is tried in New Jersey. This heavy expense and inconvenience can be avoided if the plaintiff brings his action against the defendant in the Courts of Puerto Rico.

8. The defendant, A. H. Bull Steamship Co., herewith pledges itself to the Superior Court of New Jersey to voluntarily appear in any action which may be brought against it by the plaintiff in regard to the alleged accident on or about March 30, 1955 on the SS Jean in the Courts of Puerto Rico or in the Federal District Court of the District of Puerto Rico

9. On behalf of the defendant, A. H. Bull Steamship Co., this affiant respectfully submits that the pending action is one in which the legal doctrine of *forum non conveniens* should be applied and the Complaint dis-

missed as the alleged accident occurred in Puerto Rico, the plaintiff is a resident of Puerto Rico, the witnesses reside in Puerto Rico, the Doctors who treated the plaintiff reside in Puerto Rico, the medical and work records are in Puerto Rico and the defendant pledges itself to appear in an action instituted by the plaintiff in Puerto Rico.

Subscribed and sworn to this 17th day of October 1956, before me, a Notary Public in and for the County and State of New York, as witness my hand and official seal.

/s/ Willard A. Kiggins, Jr.
Willard A. Kiggins, Jr.

/s/ Jacob H. Mittler
Jacob H. Mittler
Notary Public, State of New York
Qualified in Queens County
No. 41-7977300 (Seal)
Cert. filed with N. Y. Co. Clk.
Term Expires March 30, 1958

Superior Court of New Jersey
Law Division, Essex County
Docket No. L-800-56

FELIPE ALMESTICA,
Plaintiff,

vs.

BALTIMORE INSULAR LINE, INC.,
Defendant.

MOTION TO DISMISS COMPLAINT
(Filed 10/22/56)

TO: SAMUEL M. COLE, ESQ.
Attorney for Plaintiff
586 Newark Avenue
Jersey City 6, New Jersey

SIR:

TAKE NOTICE that on Friday, the 2nd day of November, 1956, we shall apply to the above stated Court at the Court House, in the City of Newark, Essex County, New Jersey at 9:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order dismissing the above action on the following grounds:

1. The plaintiff is a resident of the Commonwealth of Puerto Rico.

2. The accident out of which the said cause of action arose, occurred in the Commonwealth of Puerto Rico or on a vessel moored in territorial waters at the Port of Ponce, Puerto Rico.

3. The defendant pledges itself to voluntarily appear in any action which may be brought against it in Puerto Rico.

4. All the witnesses, together with the medical and work records, required at the trial, are residents of the

Commonwealth of Puerto Rico and are subject to subpoena by its courts and by the United States District Court for Puerto Rico and are not subject to subpoena or answerable to process issuing out of the Superior Court of New Jersey.

5. The expense to the parties and the inconvenience to, and loss of time by, the witnesses will be burdensome and substantially heavier if the case is tried in New Jersey rather than in Puerto Rico.

6. The suit is one in which the Court should apply the doctrine of *forum non conveniens*.

Upon said motion the defendant will rely on the complaint filed herein and the annexed affidavit, together with the brief filed herewith.

Dated: October 22, 1956.

Yours respectfully,

McCarter, English & Studer /s/
McCARTER, ENGLISH & STUDER
Attorneys for Defendant.

Affidavit

STATE OF NEW YORK)
: SS.
COUNTY OF NEW YORK)

WILLARD A. KIGGINS, JR., being duly sworn, according to law, upon his oath, deposes and says:

1. I am President of Baltimore Insular Line, Inc., defendant in the above entitled action. Said defendant, which is a steamship company, is a corporation of the State of New Jersey. It has no property in New Jersey except its stock and transfer books.

2. The defendant owns two freight vessels. It customarily time charters its vessels to Bull Insular Line for operation between ports on the Atlantic Coast of the United States and ports in Puerto Rico and San Domingo. It also occasionally time charters its vessels to other steamship companies. Defendant's vessels do not regularly call at ports in the State of New Jersey.

3. Plaintiff, as appears from his Complaint, is a resident of Puerto Rico. His address is Belginca Calle No. 5 #67, Ponce, Puerto Rico.

4. The alleged accident to the plaintiff for which he seeks damages in this action occurred at Ponce, Puerto Rico on December 1, 1955. At that time, plaintiff was working as a longshoreman on the SS Carolyn.

5. All of the witnesses to the said accident reside in Playa de Ponce, Puerto Rico. Said Playa de Ponce is upwards of 1500 nautical miles distant from Newark, New Jersey, and in order to travel from one place to the other it is necessary to go either by airplane or freight ship. There is no ship passenger service.

6. As stated above all the witnesses reside in Puerto

Rico. These witnesses are: Cristobal Quinones Rodriguez, Lorenzo Avisa St. No. 80, Playa de Ponce, Puerto Rico, Carlos Vargas Gutierrez, Lorenzo Avisa St., Playa de Ponce, Puerto Rico, Eusevio Mercado, Playa de Ponce, Puerto Rico, Miguel Torres Torres, Playa de Ponce, Puerto Rico. In addition, the plaintiff was treated by Doctors of the State Insurance Fund of the Commonwealth of Puerto Rico. The applicable medical and work records are all in Puerto Rico. None of the said witnesses is subject to process of subpoena or other compulsory process issuing out of the Superior Court of New Jersey, but is subject to subpoena or compulsory process issued only in the Commonwealth of Puerto Rico. The alleged accident occurred within the jurisdiction of the Commonwealth of Puerto Rico.

7. If the said action is to be tried in the Superior Court of New Jersey it will entail heavy expense to both the defendant and the plaintiff. The inconvenience to witnesses and loss of time by witnesses will be burdensome to them if the case is tried in New Jersey. This heavy expense and inconvenience can be avoided if the plaintiff brings his action against the defendant in the Courts of Puerto Rico.

8. The defendant, Baltimore Insular Line, Inc., herewith pledges itself to the Superior Court of New Jersey to voluntarily appear in any action which may be brought against it by the plaintiff in regard to the alleged accident on or about December 1, 1955 on the SS Carolyn in the Courts of Puerto Rico or in the Federal District Court of the District of Puerto Rico.

9. On behalf of the defendant, Baltimore Insular Line, Inc., this affiant respectfully submits that the pending action is one in which the legal doctrine of *forum non conveniens* should be applied and the Complaint dismissed as the alleged accident occurred in

Puerto Rico, the plaintiff is a resident of Puerto Rico, the witnesses reside in Puerto Rico, the Doctors who treated the plaintiff reside in Puerto Rico, the medical and work records are in Puerto Rico and the defendant pledges itself to appear in an action instituted by the plaintiff in Puerto Rico.

Subscribed and sworn to this 17th day of October 1956, before me, a Notary Public in and for the County and State of New York, as witness my hand and official seal.

s/ Willard A. Kiggins, Jr.
Willard A. Kiggins, Jr.

s/ Jacob H. Mittler
Jacob H. Mittler
Notary Public, State of New York
Qualified in Queens County
No. 41-7977300 (Seal)
Cert. filed with N. Y. Co. Clk.
Term Expires March 30, 1958

Superior Court of New Jersey
Law Division, Essex County
Docket No. L-825-56

JUAN ECHEVARRIA RODRIGUEZ,
Plaintiff,

vs.

A. H. BULL STEAMSHIP CO.,
Defendant.

MOTION TO DISMISS COMPLAINT
(Filed 10/22/56)

TO: SAMUEL M. COLE, ESQ.
Attorney for Plaintiff
586 Newark Avenue
Jersey City 6, New Jersey

SIR:

TAKE NOTICE that on Friday, the 2nd day of November, 1956, we shall apply to the above stated Court at the Court House, in the City of Newark, Essex County, New Jersey at 9:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order dismissing the above action on the following grounds:

1. The plaintiff is a resident of the Commonwealth of Puerto Rico.

2. The accident out of which the said cause of action arose, occurred in the Commonwealth of Puerto Rico or on a vessel moored in territorial waters at the Port of Ponce, Puerto Rico.

3. The defendant pledges itself to voluntarily appear in any action which may be brought against it in Puerto Rico.

4. All the witnesses, together with the medical and work records, required at the trial, are residents of the

Motion to Dismiss Complaint

Commonwealth of Puerto Rico and are subject to subpoena by its courts and by the United States District Court for Puerto Rico and are not subject to subpoena or answerable to process issuing out of the Superior Court of New Jersey.

5. The expense to the parties and the inconvenience to, and loss of time by, the witnesses will be burdensome and substantially heavier if the case is tried in New Jersey rather than in Puerto Rico.

6. The suit is one in which the Court should apply the doctrine of *forum non conveniens.*

Upon said motion the defendant will rely on the complaint filed herein and the annexed affidavit, together with the brief filed herewith.

Dated: October 22, 1956

Yours respectfully,

McCarter, English & Studer /s/
McCARTER, ENGLISH & STUDER
Attorneys for Defendant.

Motion to Dismiss Complaint & Affidavit

Affidavit

STATE OF NEW YORK)
: SS.
COUNTY OF NEW YORK)

WILLARD A. KIGGINS, JR., being duly sworn, according to law, upon his oath, deposes and says:

1. I am President of the A. H. Bull Steamship Co., defendant in the above entitled action. Said steamship company is a corporation of the State of New Jersey. It has no property in New Jersey except its stock and transfer books.

2. Defendant company operates a fleet of freight vessels. Its activities are far flung. It does a large shipping business between ports on the Atlantic Coast of the United States and ports in Puerto Rico. Vessels time-chartered from defendant, A. H. Bull Steamship Co., regularly go from the United States to the Commonwealth of Puerto Rico. These vessels do not call at ports in the State of New Jersey.

3. Plaintiff, as appears from his Complaint, is a resident of Puerto Rico. His address is Barrio Santoma, Playa de Ponce, Puerto Rico.

4. The alleged accident to the plaintiff for which he seeks damages in this action occurred at Ponce, Puerto Rico on September 3, 1954. At that time, plaintiff was working on the SS Elizabeth as a longshoreman in the employ of Commonwealth of Puerto Rico, Pier Emergency Administration.

5. All of the witnesses to the said accident reside in Ponce, Puerto Rico. Said Ponce is upwards of 1500 nautical miles distant from Newark, New Jersey, and in order to travel from one place to the other it is necessary to go either by airplane or freight ship. There is no ship

passenger service.

6. As stated above all the witnesses reside in Puerto Rico. These witnesses are: Ramon Pacheco Perez, Ponce, Juan Gallego, Ponce, Mariano Santiago Ruiz, Ponce, Domingo Rivera Granado, Ponce, Ramon Cabrera, Ponce and Modesto Cortes Loran, Ponce. In addition, the plaintiff was hospitalized at Pila Clinic in Puerto Rico and was treated by the following Doctors: Dr. J. A. Iguina Reyes, Acting Medical Director, Center of Traumatic Surgery & Rehabilitation, Ponce, Puerto Rico, Dr. Hector Marero Otero, State Insurance Fund, San Juan, Puerto Rico, Dr. Max Ramirez de Arellano, San Juan, Puerto Rico and Dr. J. M. Quinones, State Insurance Fund, San Juan, Puerto Rico. The applicable medical and work records are all in Puerto Rico. None of the said witnesses is subject to process of subpoena or other compulsory process issuing out of the Superior Court of New Jersey, but is subject to subpoena or compulsory process issued only in the Commonwealth of Puerto Rico. The alleged accident occured within the jurisdiction of the Commonwealth of Puerto Rico.

7. If the said action is to be tried in the Superior Court of New Jersey it will entail heavy expense to both the defendant and the plaintiff. The inconvenience to witnesses and loss of time by witnesses will be burdensome to them if the case is tried in New Jersey. This heavy expense and inconvenience can be avoided if the plaintiff brings his action against the defendant in the Courts of Puerto Rico.

8. The defendant, A. H. Bull Steamship Co., herewith pledges itself to the Superior Court of New Jersey to voluntarily appear in any action which may be brought against it by the plaintiff in regard to the alleged accident on or about September 3, 1954 on the SS Elizabeth in the Courts of Puerto Rico or in the Federal District

Court of the District of Puerto Rico.

9. On behalf of the defendant, A. H. Bull Steamship Co., this affiant respectfully submits that the pending action is one in which the legal doctrine of *forum non conveniens* should be applied and the Complaint dismissed as the alleged accident occurred in Puerto Rico, the plaintiff is a resident of Puerto Rico, the witnesses reside in Puerto Rico, the Doctors who treated the plaintiff reside in Puerto Rico, the medical and work records are in Puerto Rico and the defendant pledges itself to appear in an action instituted by the plaintiff in Puerto Rico.

Subscribed and sworn to
this 17th day of October
1956, before me, a Notary
Public in and for the County
and State of New York, as
witness my hand and
official seal.

/s/ Willard A. Kiggins, Jr.
Willard A. Kiggins, Jr.

/s/ Jacob H. Mittler
Jacob H. Mittler
Notary Public, State of New York
Qualified in Queens County
No. 41-7977300 (Seal)
Cert. filed with N. Y. Co. Clk.
Term Expires March 30, 1958

OPINION
(Filed 4/4/57)

Superior Court
Law Division, Essex County
Docket Nos. L-837-56,
L-800-56, L-825-56.

ANGEL PAIN VARGAS,
Plaintiff
vs. Docket No. L-837-56
A. H. BULL STEAMSHIP CO.,
Defendant.

FELIPE ALMESTICA,
Plaintiff,
vs. Docket No. L-800-56
BALTIMORE INSULAR LINE, INC.,

JUAN ECHEVARRIA RODRIGUEZ,
Plaintiff,
vs. Docket No. L-825-56
A. H. BULL STEAMSHIP CO.,
Defendant.

Appearances:

MCCARTER, ENGLISH & STUDER (Nicholas Canover English, of Counsel) for Defendants

SAMUEL L. COLE for Plaintiffs

GAULKIN, J. C. C. (temporarily assigned)

Opinion

In each of the above entitled cases, the defendant moves to dismiss the action on the ground that this court is a forum non conveniens.

Each plaintiff is a resident of Puerto Rico. Each complaint alleges plaintiff was injured in an accident on a defendant's ship, for which that defendant is liable under "46 U. S. Code 688, commonly known as the Jones Act." Each accident happened in Puerto Rico.

Each defendant is a corporation organized under the laws of New Jersey. None of the defendants could have been served with process in Puerto Rico when these actions were started. Defendants do say that since their ships ply regularly between Puerto Rico and American mainland ports, plaintiffs could have attached the ships. However defendants do not show that attachment in Puerto Rico is as simple and effective as the service of plenary process. Attachment usually involves posting bond, the expense and the mechanics of seizure, questions of ownership, liens, equity, and so forth, to say nothing of the limited effect and enforceability of the resulting judgment. Therefore, since defendants have not sustained the burden to prove otherwise, I find for the purpose of these motions that defendants could not have been sued in Puerto Rico.

Anticipating this, each defendant "pledges itself to voluntarily appear in any action which may be brought against it in Puerto Rico", if these motions to dismiss are granted.

The question therefore narrows itself to this—assuming these be cases which the court would dismiss under forum non conveniens had defendants been amenable to process in Puerto Rico when the actions were started, may the court do so upon defendants' present offer to appear there?

Plaintiffs contend the court may not do so for the following reasons, (1) by virtue of the federal statutes and cases, a state court does not have the power to refuse to hear a case brought under the Jones Act, (2) the doctrine

of forum non conveniens may be applied only when plaintiff had a choice of forums when he started suit and (3) even if (1) and (2) be resolved against plaintiffs, the facts here do not justify the application of the doctrine.

I

In support of argument (1), plaintiffs say the Jones Act (46 U.S.C. Sec. 688) gives plaintiffs who sue thereunder the benefit of "all statutes of the United States conferring or regulating the right of action in the case of railway employees," one of which statutes is the Federal Employers Liability Act (45 U.S.C. Sec. 51-60); that Section 56 of the F.E.L.A. gives the plaintiff the absolute right to sue, *inter alia*, in the courts of the state in which the defendant resides; and that these statutes compel state courts to retain and decide all F.E.L.A. and Jones Act cases instituted therein, even though those courts would dismiss, under forum non conveniens, similar cases not brought under those acts. In support of this proposition plaintiffs rely chiefly on *Miles v. Illinois Central R. Co.*, 315 U. S. 698, 62 S. Ct. 827 (1942), *Baltimore & Ohio R. Co. v. Kepner*, 314 U. S. 44, 62 S. Ct. 6 (1941); *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501, 67 S. Ct. 839 (1947); and *Ex Parte Collett*, 337 U. S. 55, 69 S. Ct. 944 (1949).

There is no need to discuss these cases in detail because in *State ex rel Southern R. Co. v. Mayfield*, 340 U. S. 1, 71 S. Ct. 1 (1950) the Supreme Court settled the question adversely to the position taken by plaintiffs. As Justice Jacobs said in *Gore v. U. S. Steel Corp.*, 15 N. J. 301, 312 (1954) cert. denied, 348 U. S. 861, 75 S. Ct. 84 (1954), in the Mayfield case "the Supreme Court indicated that forum non conveniens may be applied by a state court even in a proceeding under the Federal Employers Liability Act so long as the policy is administered impartially and without discrimination." Plaintiffs

contend that "the underpinning of the Mayfield case has been cut away by *Pope v. Atlantic Coast Line R. Co.*, 345 U. S. 379, 73 S. Ct. 749 (1953)," and therefore the Mayfield case may no longer be considered as controlling but an examination of the opinions in the Pope case shows it did not weaken the Mayfield case in the least. Many cases decided since Pope have held Mayfield still to be controlling. E.G. *Hill v. Upper Mississippi Towing Corporation*, 141 F. Supp. 692 (D. Minn. 1956); *Price v. Atchison, T. & S. F. Ry. Co.*, 268 P. 2d 457 (Cal. S. Ct. 1954); *Atlantic Coast Line v. Pope*, 93 Ga. App. 550, 92 S. F. 2d 300 (C. of A. 1956); *Peterie v. Thompson*, 10 Ill. App. 2d 100, 134 N. E. 2d 534 (1956); *Johnson v. C. B. & Q. R. R. Co.*, 243 Minn. 58, 66 N. W. 2d 763 (S. Ct. 1954); *Maynard v. C. & N. W. Ry. Co.*, 77 N. W. 2d 183 (Minn. S. Ct. 1956); *St. Louis-S. F. Ry. Co. v. Superior Court*, 276 P. 2d 773 (Okla. S. Ct. 1954); *Norwood v. Kirkpatrick*, 349 U. S. 29, 75 S. Ct. 544 (1955). See also the notes in 43 A. L. R. 2d 774 and 48 A. L. R. 2d 850.

II

We return then to the principal question—may forum non conveniens be applied in the only jurisdiction in which plaintiff can obtain service on defendant, upon defendant's offer to submit to suit in the more convenient forum?

Defendants cite *Rodriguez v. A. H. Bull Steamship Co.*, 286 App. Div. 804, 143 N. Y. S. 2d 618 (1955). In that case the lower court had refused to dismiss the action brought in New York under the Jones Act by a citizen of Puerto Rico against a New Jersey corporation, for an accident which happened in Puerto Rico. The Appellate Division reversed. Its brief memorandum did not discuss the law, but said:

> "On the defendant's stipulation to appear in the courts of Puerto Rico in any action instituted by the

plaintiff to recover on the cause of action alleged in the complaint herein and to waive the statute of limitations, the orders appealed from are unanimously reversed, the motion to dismiss the complaint granted and judgment is directed to be entered in favor of the defendant dismissing the complaint herein."

Although "the New York courts will as a matter of public policy refuse to retain jurisdiction in an action between non-residents for torts arising outside the state, unless special reasons are shown" (48 A. L. R. 2d 831 and cases cited), it must be admitted that in the Rodriguez case defendant's consent to appear was apparently the controlling consideration.

We accept it to be settled that "in all cases in which the doctrine of forum non conveniens comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them." *Gulf Oil v. Gilbert,* 330 U. S. 501, supra, at pages 506-507; *Foster-Milburn v. Knight,* 181 F. 2d 949 (2d Cir. 1950); *Gore v. U. S. Steel,* supra. Plaintiffs insist that "amenable to process" means it "shall not be dependent merely upon the will or grace of the defendant, but must be provided by law," citing *Tivoli Realty v. Interstate Circuit,* 167 F. 2d 155, 157 (5th Cir. 1948) cert. den. 334 U. S. 837 (1948). See also the dissenting opinion in *Paramount Pictures v. Rodney,* 186 F. 2d 111, 119, (3d Cir. 1950), and *General Electric v. Central Transit,* 127 F. Supp. 817 (D. Mo. 1955). However, the Tivoli case was not one in which the defendants moved to dismiss on forum non conveniens in the U. S. District Court in Delaware where the action was pending, but one in which the defendants had gone into Texas, Tivoli's home state, to enjoin the Delaware action. That is a quite different situation than the application forum non conveniens in the jurisdiction in which the action is pending. As the Fifth Circuit Court of Appeals

said in the Tivoli case, "the parties failed to present the issue of inconvenience to the Delaware court . . . federal district courts are within a single judicial system . . . therefore, as a matter of comity, we think the court below erred in granting the injunction." *Miles v. Illinois Central R. Co., Baltimore & Ohio v. Kepner, and Pope v. Atlantic Coast Line,* supra, were all cases in which the defendants were denied injunctions in jurisdictions other than the one in which the action was pending. See also the notes in 57 A. L. R. 77, 115 A. L. R. 237, and 6 A. L. R. 2d 896.

Compare with such cases *Southern R. Co. v. Mayfield,* supra, and *Paramount Pictures v. Rodney,* supra. The latter case was the sequel to the Tivoli case. The defendants in the Tivoli case, after the decision in 167 F. 2d 155 quoted above, applied to the U. S. District Court in Delaware to transfer the case to the U. S. District Court in Texas under 28 U. S. Code Section 1404 (a). The District judge refused, but the Third Circuit Court of Appeals reversed, *Paramount Pictures v. Rodney,* supra. It is true that the majority opinion in *Paramount Pictures v. Rodney* disclaimed any intention of disagreeing with the Tivoli case. It pointed out that 1404 (a) had not yet been adopted when Tivoli was decided, inferring that under 1404 (a) Tivoli might have been decided differently. But *Pope v. Atlantic Coast Line,* supra, shows that the decision in Tivoli (167 F. 2d 155) would be the same under 1404 (a). In the *General Electric* case the District Court found the defendant was amenable to process in the more convenient jurisdiction and did transfer the case to it, under 1404 (a).

In short, no authority has been submitted, nor have I found any, in which the application of the doctrine has been refused to a defendant who agreed to accept service, *solely* because defendant was not subject to process in the more convenient jurisdiction *when the action was started.*

The nub of plaintiffs' argument is that forum non conveniens may be applied *only* where a plaintiff has deliberately chosen the most vexatious of two or more available forums. If that be true, it may not be applied here, for when plaintiffs filed these actions they had no choice of forums. However, I do not think it is true that the use of the doctrine is so limited.

It must be admitted that there is much language in the authorities that lends support to the idea that the doctrine is applied only when the plaintiff, by choice of an inconvenient forum, does "vex, harrass, or oppress the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy." *Gulf Oil v. Gilbert*, supra. Indeed some authorities treat the doctrine as if its sole purpose is to prevent "forum shopping", *O'Herin, Forum Non Conveniens in Federal Employers Liability Act cases*, 1 Def. L. J. 48 (1957). Forum shopping is not an unreal problem (Gore, p. 313), but the use of forum non conveniens to meet this problem when it arises is not the reason for the doctrine but merely one beneficial effect of its operation.

The circumstances under which the court will apply the doctrine is a matter of local law, *State ex rel. Southern R. Co. v. Mayfield*, supra; 362 Mo. 101, 240, S. W. 2d 106 (Sup. Ct. 1951), cert. den. 342 U. S .871, 72 S. Ct. 107, 96 L. Ed. 655 (1951). The New Jersey Supreme Court, in the Gore case, laid down the principles which trial judges in this state must follow in applying the doctrine. In that case our Supreme Court declared that "the dispositive consideration" is where will trial "best serve the convenience of the parties and the ends of justice . . . It resists formalization and looks to the realities that make for doing justice."

The doctrine may be applied in cases in which there is no forum shopping. For example, it may be applied even against resident plaintiffs. As Justice Jacobs said in the Gore case (p. 311):

> "It turns, rather, on considerations of convenience and justice and it may, therefore, be applied for and against domestic residents and citizens as well as for and against foreign residents and citizens. It is true that under the doctrine an action by or against a resident will ordinarily not be dismissed as being in an inconvenient forum, but it is also true that ordinarily an action by or against a non-resident will not be dismissed as such. It is only in those exceptional cases where a weighing of all of the many relevant factors, of which residence is but part, decisively establishes that there is available another forum where trial will best serve the convenience of the parties and the ends of justice, that the doctrine is ever invoked."

See also the cases discussed by Justice Jacobs at pp. 307-308 of the Gore opinion.

A footnote to the dissenting opinion of Justice Clark, Douglas and the Chief Justice in *Norwood v. Kirkpatrick*, 349 U. S. 29, 75 S. Ct. 544 (1955) at 35, lists numerous cases in which it has been stated that the paramount consideration is the ends of justice. See also *Barrett, The Doctrine of Forum Non Conveniens*, 35 Calif. L. Rev. 380 (1947); *Braucher, The Inconvenient Federal Forum*, 60 Harv. L. Rev. 908 (1947); *Dainow, The Inappropriate Forum*, 29 Ill. L. Rev. 867 (1935); *Foster, Place of Trial–Interstate Application of Intrastate Methods of Adjustment*, 44 Harv. L. Rev. 41 (1930); *Blair, The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 Col. L. Rev. 1 (1929).

There are no immutable boundaries confining the doctrine, nor should there be. As Justice Jackson said in *Gulf Oil Corp. v. Gilbert*, supra, at pp. 842-843:

> " . . . the problem is a very old one *affecting the administration of the courts as well as* the rights of litigants, and both in England and in this country the

common law worked out techniques and criteria for dealing with it.

"Wisely, it has not been attempted to catalogue the circumstances which will justify or require either grant or denial of remedy. The doctrine leaves much to the discretion of the court to which plaintiff resorts, and experience has not shown a judicial tendency to renounce one's own jurisdiction so strong as to result in many abuses." (Emphasis added.)

In *Koster v. Lumberman's Mutual*, 330 U. S. 518, 67 S. Ct. 828 (1947) at page 524, the Supreme Court said the doctrine is applied not only in cases of oppression and vexation, but also when the facts "make trial in a chosen forum inappropriate because of considerations affecting the court's own administrative and legal problems." And Justice Jacobs said (Gore, p. 306) "Factors of public interest also have place in applying the doctrine."

R. R. 4:1-2 has declared the public policy of our practice to be "to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." And though he spoke before the adoption of the rule, Judge Brown spoke in its spirit when he said, in *Kantakevich v. D. L. & W. R. R. Co.*, 18 N. J. Misc. 77, 80, 10 A. 2d 651 (Cir. Ct. 1940):

"The question of whether a trial court should refuse to exercise its jurisdiction where the reasons are cogent and clear involves more than comity, courtesy or the doctrines of forum non conveniens. It may involve reasons which might be successfully advanced in cases between citizens of our state in our courts; an increase of judges and courts necessitated by an excessive influx of foreign litigation from other states and foreign countries attended by an unreasonable burden of expense upon the taxpayers of New Jersey and to the detriment of citizens of our state in having their cases tried; the prevention of vexa-

tious practices in the trial of cases and to leave our trial courts their inherent right to see that justice is fairly administered and to encourage trials to be held in the forum where the remedy is more complete. It involves not only the right of a foreign litigant but also the remedy to be fairly and justly controlled. Stated more succinctly where the ends of justice clearly indicate that if a controversy tried in this state would result in an unfair burden upon and disadvantage to citizens of this state or that the controversy may be more suitably tried and the remedy more complete in another forum, then the parties should be relegated to that forum. A detailed and settled rule of procedure that would apply in every case is difficult if not impossible to state. It may be necessary to decide each case upon the facts and circumstances connected with the case."

In his landmark article *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 Col. L. Rev. 1, supra, Paxton Blair pointed out that the doctrine grew from small beginnings in individual cases in which the court sought to do justice under particular circumstances. It was only after a number of such cases had been decided over many years that someone thought to extract a principle from them, and to give that principle a latin name. According to Blair, American courts did not even begin to use the term "forum non conveniens" until 1916.

Giving a latin name to the doctrine did not mean that it had reached its full maturity and had lost all capacity for growth and accommodation, like a butterfly preserved in amber. As is true with so many doctrines in our law, the cases in which this doctrine has been applied give internal evidence of its capacity for accommodation. As Robert Braucher aptly said in *The Inconvenient Federal Forum*, 60 Harv. L. Rev. 908, supra at pp. 930-932:

"It should be apparent from this survey that the principal characteristic of this branch of the law is its absurd complexity. A major source of the difficulty is that under the rather amorphous heading forum non conveniens the courts have been influenced by two basic notions whose implications are not entirely consistent: that of abuse of process and that of trial convenience.

"Both notions appear in *Gulf Oil Corp. v. Gilbert*, but the first gets star billing. 'Imposition on the court's jurisdiction', 'vexation', 'oppression', 'harassment': this is the language of abuse of process. It assimilates forum non conveniens to the jurisdiction of equity to enjoin vexatious and oppressive suits . . .

"Thus conceived, we should not expect forum non conveniens to be a judicial favorite . . .

"Forum non conveniens is more appealing when considered as a discretionary adjunct to the rules regulating place of trial. The parties may have legitimate differences as to the appropriate place to try the lawsuit, differences which cannot always be satisfactorily resolved by rules of jurisdiction, venue, and service of process . . . The practice then would be to stay the action on the application of the defendant in a proper case, but only on condition that he enter an appearance in the more convenient forum, make an effective waiver of any advantages the delay might otherwise afford him, and comply with such other terms as justice may require. Jurisdiction would be retained to ensure that the case would be transferred smoothly and fairly. The stay order would be interlocutory; if appealable at all, it would be reversible only if it had no rational basis.

"The early practice in Scotland seems sometimes to have followed such a pattern; and in this country, particularly in admiralty, judicial decisions can be

found which tend to support it."

As Justice Jacobs pointed out in the Gore case, p. 307:

> "Under modern conditions corporations are often incorporated in states other than those where their main business is conducted and . . . under such circumstances the corporate domicil is entitled to little weight under the convenient forum doctrine 'which resists formalization and looks to the realities that make for doing justice'."

Today there are many corporations whose operations carry their agents and their ships, trains, planes, vehicles and other property into every state in the Union and all over the world. The application of forum non conveniens to suits against such a corporation should not depend upon the accident of whether it could have been served with process in the more convenient jurisdiction without its consent. Involuntary amenability to process often depends on tenuous distinctions and accidents of local law. A vast body of law has grown up about the concept of "doing business", and over the numerous statutes permitting service upon conductors, ticket agents, solicitors, commissioners of motor vehicles, etc. The cases which set aside or refuse to set aside service on corporate officers, directors, employees and other agents are as numerous as they are varied in result in the several states. No reason occurs to me, and none has been suggested, why consent of the defendant now given should not be equal to the establishment of involuntary amenability under one of these statutes or cases. See for example *General Electric v. Central Transit*, supra. In that case Judge (now Supreme Court Justice) Wittaker held that defendant was *not* amenable to process in the more convenient forum (and therefore he refused to transfer under 1404(a)); but upon reargument he held upon the same facts that it *was* amenable to process, and granted the transfer.

Opinion

In 1948 Congress revised Title 28 of the United States Code and provided in Sec. 1404(a) that:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division *where it might have been brought.*" (Emphasis added.)

In spite of the underlined language, the federal courts have held that a case may be transferred to a district in which the defendant is not amenable to process, i.e. where it could *not* have been brought, upon defendant's consent to appear. In other words, the federal courts held that "the convenience of parties and witnesses" and "interest of justice" are to be determined by what can now be accomplished, not by what might have been. Those courts have frankly equated the words "where it might have been brought" with "where it can now be brought." See for example *Paramount Pictures v. Rodney*, supra; *Torres v. Walsh*, 221 F. 2d 319 (2d Cir. 1955) cert. denied, 350 U. S. 836, 76 S. Ct. 72 (1955); *In re Josephson*, 218 F. 2d 174 (1st Cir. 1954); *Anthony v. Kaufman*, 193 F. 2d 85 (2d Cir. 1951), cert. denied, 342 U. S. 955, 72 S. Ct. 629 (1951); *Cain v. Bowater's Newfoundland Pulp & Paper Mills*, 127 F. Supp. 949 (E. D. Pa. 1954). These and other cases are collected and discussed by Judge Irving R. Kaufman in his excellent *"Observations on Transfers under Section 1404(a)"*, 10 F. R. D. 595 (1951) and *"Further Observations On Transfers under Section 1404 (a)"*, 56 Col. L. R. 1 (1956). See also 51 Col. L. R. 762 (1951).

There have been vigorous dissents to this construction of 1404(a), as in *Paramount Pictures v. Rodney*, supra, but these dissents are based on the fact that it is a statute (1404(a)) which is being construed, and the argument is that the underlined language of 1404(a) should be taken literally, as written by Congress, especially since

it has been held that 1404(a) is "different" than forum non conveniens, *Norwood v. Kirkpatrick*, supra. However since we are dealing here not with a statute, but with the common law doctrine of forum non conveniens as defined by the New Jersey Supreme Court in the Gore case, our approach may be broader than if we were called upon to construe a statute. Therefore the logic of the federal cases which even in construing a statute equate present consent with antecedent amenability to service, in spite of the underlined words of 1404(a), is most persuasive to lead us to the same result here. As Judge Biggs said in *Paramount Pictures v. Rodney*, supra, at p. 114:

> "By joining in the motion to transfer the defendants have waived any objection to Texas venue and have agreed to submit themselves to a Texas court. Therefore, suits embracing the same parties and the same subject matter could now be brought and maintained in Texas . . . The difference between the phrase "might have been brought" of Section 1404 (a) and that employed in this opinion, "could now be brought", is no more than one of tense and grammar, the imperfect subjunctive as compared to the pluperfect subjunctive. Surely Congress did not intend the effect of an important remedial statute to turn upon tense or a rule of grammar."

It is true that under 1404(a) the federal courts do not dismiss, as is ordinarily the disposition in cases of forum non conveniens, but transfer from one branch of the Federal judicial system to another. It has been said that that is the reason federal courts transfer under 1404(a) when they would not dismiss under forum non conveniens. However, as Braucher pointed out, supra, even at common law cases were sometimes stayed rather than dismissed; and as Justice Jacobs pointed out in the Gore case, in New Jersey even after dismissal upon forum non conveniens the plaintiff may return to this court if it later develops

that an injustice was done to the plaintiff by the dismissal.

The fact that the federal courts take into consideration that transfer under 1404(a) is not as drastic as dismissal is itself an illustration of the point that the application based on forum non conveniens is addressed to the court's discretion, and the court to which the plaintiff is to be relegated (as well as the defendant's amenability or willingness to be sued therein) are merely facts to be taken into consideration with all of the other relevant facts in deciding how that discretion is to be exercised. In that connection it is to be noted that at about the same time that the above actions were instituted, the attorney for the plaintiffs in these three cases instituted five other Puerto Rican plaintiffs against the same defendants on similar claims, in the United States District Court for the District of New Jersey. *Flores v. A. H. Bull Steamship Co*, Docket No. 76656; *Martinez v. A. H. Bull Steamship Co*, Docket No. 76256; *Torres v. Baltimore Insular Line*, Docket No. 76556; *Aponte v. A. H. Bull Steamship Co.*, Docket No. 78956; *Morales v. A. H. Bull Steamship Co*, Docket No. 76756. Upon defendants' motions, made under 1404(a), and upon their agreement to appear in Puerto Rico, the United States District Judge in New Jersey transferred the cases to the United States District Court in Puerto Rico.

The United States District Court for the District of New Jersey is only a few blocks from this court, in the City of Newark. Certainly if the convenience of the parties and witnesses and the interest of justice commanded the transfer of the cases pending in the federal court to Puerto Rico, they do in this court. It would be odd indeed to say it is convenient for the parties and witnesses to try their cases in this court on Market Street, but not in the federal court on Broad Street, and that the interest of justice is different in the two locations.

Opinion

Let us then turn to the sole remaining question which is, as Justice Jacobs said, "Where will trial best serve the convenience of the parties and the ends of justice?"

III

As has been stated, each accident happened in Puerto Rico, on a ship moored in Puerto Rican waters. Each plaintiff was hospitalized in Puerto Rico. In each case the issue has been raised that the plaintiff was not an employee of the defendant but of an independent contractor. Most if not all of the witnesses to the accident are residents of Puerto Rico. Witnesses that may be required to prove that plaintiff was the employee of someone other than defendant are residents of Puerto Rico. The doctors who treated each plaintiff are residents of Puerto Rico. The hospital and other records are in Puerto Rico. The language common to the plaintiffs and the witnesses is Spanish. If the cases were tried here, it would involve bringing witnesses a long distance at great expense or the taking of depositions and, in either event, much translation. As the court said in *Gulf Oil v. Gilbert*, supra, at page 844:

> "Certainly to fix the place of trial at a point where litigants cannot compel personal attendance and may be forced to try their cases on deposition, is to create a condition not satisfactory to court, jury or most litigants. Nor is it necessarily cured by the statement of plaintiff's counsel that he will see to getting many of the witnesses to the trial and that some of them "would be delighted to come to New York to testify." There may be circumstances where such a proposal should be given weight. In others the offer may not turn out to be as generous as defendant or court might suppose it to be. Such matters are for the District Court to decide in exercise of a sound discretion."

Nor are the courts of this state without an interest in the matter. These cases have no place in our courts except for the fact that the defendants are corporations of New Jersey.

For the foregoing reasons, it seems to me that the plaintiffs should be remitted to the courts of Puerto Rico.

The plaintiffs of course are entitled to have the same relative position in the courts of Puerto Rico as they have in the courts of this state as of the date these actions were begun. For example, no defense based on any statute of limitation should there be asserted which could not have been raised in New Jersey as of the date of these actions. In addition each plaintiff should be reimbursed for his costs and out of pocket expenses incurred in instituting his action in New Jersey, including a reasonable counsel fee for the institution of his action.

An order may be presented in accordance with this opinion, which shall provide that the plaintiffs have 90 days within which to institute action in Puerto Rico after which, if defendants appear therein and carry out the terms of the order, these actions will be dismissed, subject to R. R. 4:62-2.

Dated: April 4, 1957.

Superior Court of New Jersey
Law Division, Essex County
Docket No. L-837-56

ANGEL PAIN VARGAS,
Plaintiff

vs.

A. H. BULL STEAMSHIP CO.,
Defendant

ORDER OF DISMISSAL
(Filed 4/5/57)

This matter coming on to be heard in the presence of Samuel M. Cole, Esq., attorney for plaintiff, and of McCarter, English & Studer (Nicholas Conover English, Esq. appearing), attorneys for defendant, on defendant's motion to dismiss the complaint, and the Court having considered the complaint and the affidavits and briefs and arguments of counsel,

IT IS ORDERED, on this 22 day of March, 1957, that the above entitled action be and hereby is dismissed, upon the following terms:

1. If within 90 days from the date of this order, the plaintiff institutes an action in a court of Puerto Rico having jurisdiction of the subject matter set forth in the complaint herein, setting forth the cause of action alleged in the complaint herein:

(a) The defendant shall accept service of summons and complaint and shall appear in such action; and

(b) Defendant shall be permitted to interpose in such action in Puerto Rico the same, but only the same, substantive defenses, if any, including the statute of limitations that would have been available to the defendant in the above entitled action as of the date of the filing of the complaint herein.

2. In the event of a breach of either conditions (a) or (b), as contained in paragraph 1 of this order, by defendant, or for other just cause, the plaintiff may, under R. R. 4:62-2, apply to this Court for appropriate relief from the operation of this order.

3. If the plaintiff fails to institute an action in an appropriate court of Puerto Rico, as provided in paragraph 1 hereof, then 90 days from the date of this order the dismissal of the above entitled action shall be considered as final.

4. Defendant shall pay to the plaintiff's attorney:

(a) The amount actually paid to the Clerk of the Superior Court as his fees for filing the complaint herein.
(b) The amount actually paid to the Essex County Sheriff for service of process herein.
(c) A counsel fee in the amount of $200.

5. Except as herein specifically provided, no costs are awarded to either party.

/s/ Edward Gaulkin
J. S. C.

We approve the form of the within order.

/s/ Samuel M. Cole
Samuel M. Cole,
Attorney for Plaintiff

McCarter, English & Studer,
Attorneys for Defendant

By /s/ Nicholas Conover English
Nicholas Conover English,
A Member of the Firm

Superior Court of New Jersey
Law Division - Essex County
Docket No. L-800-56

FELIPE ALMESTICA,
Plaintiff

vs.

BALTIMORE INSULAR LINE, INC.,
Defendant

ORDER OF DISMISSAL
(Filed 4/5/57)

This matter coming on to be heard in the presence of Samuel M. Cole, Esq., attorney for plaintiff, and of McCarter, English & Studer (Nicholas Conover English, Esq. appearing), attorneys for defendant, on defendant's motion to dismiss the complaint, and the Court having considered the complaint and the affidavits and briefs and arguments of counsel,

IT IS ORDERED, on this 22 day of March, 1957, that the above entitled action be and hereby is dismissed, upon the following terms:

1. If within 90 days from the date of this order, the plaintiff institutes an action in a court of Puerto Rico having jurisdiction of the subject matter set forth in the complaint herein, setting forth the cause of action alleged in the complaint herein:

(a) The defendant shall accept service of summons and complaint and shall appear in such action; and

(b) Defendant shall be permitted to interpose in such action in Puerto Rico the same, but only the same, substantive defenses, if any, including the statute of limitations that would have been available to the defendant in the above entitled action as of the date of the filing of the complaint herein.

Order of Dismissal

2. In the event of a breach of either conditions (a) or (b), as contained in paragraph 1 of this order, by defendant, or for other just cause, the plaintiff may, under R. R. 4:62-2, apply to this Court for appropriate relief from the operation of this order.

3. If the plaintiff fails to institute an action in an appropriate court of Puerto Rico, as provided in paragraph 1 hereof, then 90 days from the date of this order the dismissal of the above entitled action shall be considered as final.

4. Defendant shall pay to the plaintiff's attorney:

(a) The amount actually paid to the Clerk of the Superior Court as his fees for filing the complaint herein.
(b) The amount actually paid to the Essex County Sheriff for service of process herein.
(c) A counsel fee in the amount of $200.

5. Except as herein specifically provided, no costs are awarded to either party.

/s/ Edward Gaulkin
J. S. C.

We approve the form of the within order.

/s/ Samuel M. Cole
Samuel M. Cole,
Attorney for Plaintiff

McCarter, English & Studer,
Attorneys for Defendant

By /s/ Nicholas Conover English
Nicholas Conover English,
A Member of the Firm

Superior Court of New Jersey
Law Division, Essex County
Docket No. L-825-56

JUAN ECHEVARRIA RODRIGUEZ,
Plaintiff

vs.

A. H. BULL STEAMSHIP CO.,
Defendant

ORDER OF DISMISSAL
(Filed 4/5/57)

This matter coming on to be heard in the presence of Samuel M. Cole, Esq., attorney for plaintiff, and of McCarter, English & Studer (Nicholas Conover English, Esq. appearing), attorneys for defendant, on defendant's motion to dismiss the complaint, and the Court having considered the complaint and the affidavits and briefs and arguments of counsel,

IT IS ORDERED, on this 22 day of March, 1957, that the above entitled action be and hereby is dismissed, upon the following terms:

1. If within 90 days from the date of this order, the plaintiff institutes an action in a court of Puerto Rico having jurisdiction of the subject matter set forth in the complaint herein, setting forth the cause of action alleged in the complaint herein:

(a) The defendant shall accept service of summons and complaint and shall appear in such action; and

(b) Defendant shall be permitted to interpose in such action in Puerto Rico the same, but only the same, substantive defenses, if any, including the statute of limitations that would have been available to the defendant in the above entitled action as of the date of the filing of the complaint herein.

2. In the event of a breach of either conditions (a) or (b), as contained in paragraph 1 of this order, by defendant, or for other just cause, the plaintiff may, under R. R. 4:62-2, apply to this Court for appropriate relief from the operation of this order.

3. If the plaintiff fails to institute an action in an appropriate court of Puerto Rico, as provided in paragraph 1 hereof, then 90 days from the date of this order the dismissal of the above entitled action shall be considered as final.

4. Defendant shall pay to the plaintiff's attorney:

(a) The amount actually paid to the Clerk of the Superior Court as his fees for filing the complaint herein.

(b) The amount actually paid to the Essex County Sheriff for service of process herein.

(c) A counsel fee in the amount of $200.

5. Except as herein specifically provided, no costs are awarded to either party.

/s/ Edward Gaulkin
J. S. C.

We approve the form of the within order.

/s/ Samuel M. Cole
Samuel M. Cole,
Attorney for Plaintiff

McCarter, English & Studer,
Attorneys for Defendant

By /s/ Nicholas Conover English
Nicholas Conover English,
A Member of the Firm

Superior Court of New Jersey
Law Division, Essex County
Docket Nos. L-837-56, L-800-56,
L-825-56

NOTICE OF APPEAL
(Filed 5/13/57)

TO: MCCARTER, ENGLISH & STUDER, ESQS.
Attorneys for Defendants
11 Commerce Street
Newark, 2, New Jersey

SIRS:

NOTICE IS HEREBY GIVEN that the plaintiffs, Angel Pain Vargas, Felipe Almestica and Juan Achevarria Rodriguez, appeal to the Appellate Division of the Superior Court of New Jersey from an Order of Dismissal of the complaints, which is a final judgment from the Law Division of the Superior Court of New Jersey, entered in favor of the defendants in these actions on March 22, 1957, and served on the defendants' attorney on April 2, 1957.

There is no transcript in these cases; this was on argument as a result of motions to dismiss.

Samuel M. Cole /s/
Samuel M. Cole
Attorney for Plaintiffs

Superior Court of New Jersey
Law Division, Essex County
Docket No. L-837-56

ANGEL PAIN VARGAS,
Plaintiff

vs.

A. H. BULL STEAMSHIP CO.,
Defendant

NOTICE OF CROSS-APPEAL
(Filed 5/16/57)

Notice is hereby given that the defendant, A. H. Bull Steamship Company appeals to the Appellate Division of the Superior Court of New Jersey from so much of Paragraph 4 of the Order of Dismissal dated March 22, 1957, as orders the defendant to pay the plaintiff's attorney a counsel fee in the amount of $200.00.

Dated: May 15, 1957

McCARTER, ENGLISH & STUDER,
Attorneys for Defendant

By Nicholas Conover English /s/
Nicholas Conover English
A Member of the Firm

Superior Court of New Jersey
Law Division - Essex County
Docket No. L-800-56

FELIPE ALMESTICA,
Plaintiff

vs.

BALTIMORE INSULAR LINE, INC.,
Defendant

NOTICE OF CROSS-APPEAL
(Filed 5/16/57)

Notice is hereby given that the defendant, Baltimore Insular Line, Inc., appeals to the Appellate Division of the Superior Court of New Jersey from so much of Paragraph 4 of the Order of Dismissal dated March 22, 1957, as orders the defendant to pay the plaintiff's attorney a counsel fee in the amount of $200.00.

Dated: May 15, 1957

McCARTER, ENGLISH & STUDER,
Attorneys for Defendant

By Nicholas Conover English /s/
Nicholas Conover English,
A Member of the Firm

Superior Court of New Jersey
Law Division - Essex County
Docket No. L-825-56

JUAN ECHEVARRIA RODRIGUEZ,
Plaintiff

vs.

A. H. BULL STEAMSHIP CO.,
Defendant

NOTICE OF CROSS-APPEAL
(Filed 5/16/57)

Notice is hereby given that the defendant, A. H. Bull Steamship Company, appeals to the Appellate Division of the Superior Court of New Jersey from so much of Paragraph 4 of the Order of Dismissal dated March 22, 1957, as orders the defendant to pay the plaintiff's attorney a counsel fee in the amount of $200.00.

Dated: May 15, 1957

McCARTER, ENGLISH & STUDER,
Attorneys for Defendant

By Nicholas Conover English /s/
Nicholas Conover English,
A Member of the Firm

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 773

ANGEL PAIN VARGAS,
Petitioner,
v.
A. H. BULL STEAMSHIP CO.,
Respondent.

FELIPE ALMESTICA,
Petitioner,
v.
BALTIMORE INSULAR LINE, INC.,
Respondent.

JUAN ECHEVARRIA,
Petitioner,
v.
A. H. BULL STEAMSHIP CO.,
Respondent.

CONSOLIDATED PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

SAMUEL M. COLE,
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Jersey City, New Jersey.

LOUIS J. GREENBERG,
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Jersey City, New Jersey,
Of Counsel

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No.

ANGEL PAIN VARGAS,

Petitioner,

v.

A. H. BULL STEAMSHIP CO.,

Respondent.

FELIPE ALMESTICA,

Petitioner,

v.

BALTIMORE INSULAR LINE, INC.,

Respondent.

JUAN ECHEVARRIA,

Petitioner,

v.

A. H. BULL STEAMSHIP CO.,

Respondent.

CONSOLIDATED PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

The petitioners, Angel Pain Vargas, *et al.*, pray that a writ of certiorari issue to review the judgments of the Supreme Court of New Jersey entered in the above cases on November 12, 1957.

Opinions Below.

The opinion of the Superior Court of New Jersey is reported at 44 N. J. Super. 536, 121 A. 2d 139 (April 4,

1957). The opinion of the Supreme Court of New Jersey is reported at 135 A. 2d 857 (November 12, 1957).

Jurisdiction.

The judgment of the Supreme Court of New Jersey was made and entered on November 12, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1257(3); Rule 19(1a) Supreme Court Rules.

Question Presented.

In suits under the Jones Act brought in the New Jersey Superior Court respondents moved to dismiss the complaints on the doctrine of *forum non conveniens* even though *in personam* jurisdiction was not available at the site of the injury, to wit, Puerto Rico, while available in New Jersey. The petitioners contended that the New Jersey Superior Court lacked jurisdiction to dismiss the complaints under the said doctrine on the grounds that, (1) jurisdiction under the Jones Act shall be where the defendant employer resides or where its principal office is located; (2) that the doctrine presupposes at least two forums in which the defendant is amenable to involuntary service of process, and (3) the doctrine of *forum non conveniens* being an equitable doctrine, the defendants came into the New Jersey Court with unclean hands by reason of the fact that it failed and refused to qualify as a foreign corporation in Puerto Rico, where it could be available for *in personam* service of process. The Superior Court dismissed the complaints with the proviso that the respondents accept service of complaints and appear in the courts of Puerto Rico. The Supreme Court of New Jersey affirmed. The question presented is:

1. Has a State Court the power to dismiss under the *forum non conveniens* doctrine a suit arising under the Jones Act when the suit is brought in the only jurisdiction where *in personam* service of process can be obtained?

Statute Involved.

46 U. S. C. 688, otherwise known as the Jones Act, provides as follows:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

Statement.

The three cases, consolidated for argument below, present identical issues. All three plaintiffs are residents of Puerto Rico, and the two defendants are corporations of New Jersey having their principal office in New Jersey. *In personam* jurisdiction was available in New Jersey, but Puerto Rico offered no such haven and consequently plain-

tiffs were faced with the necessity of invoking the aid of the New Jersey Courts for the prosecution of their causes of action.

Accordingly, three suits were brought in the Superior Court of New Jersey under the Jones Act, 46 U. S. C. 688, for injuries sustained by the plaintiffs while loading ships owned by the defendants in the navigable waters off Puerto Rico. After service of the complaints and before the filing of an answer, the defendants moved to dismiss the respective causes of action, alleging that the suits are those in which the Court should apply the doctrine of *forum non conveniens*. The defendants pledged themselves to voluntarily appear in any action which may be brought against them in Puerto Rico. In opposition to the motion to dismiss, the plaintiffs contended that the State Court lacked jurisdiction to dismiss the complaints under the doctrine of *forum non conveniens* on the grounds that, (1) jurisdiction under the Jones Act shall be where the defendant employer resides or where its principal office is located, and (2) that the doctrine presupposes at least two forums in which the defendant is amenable to involuntary service of process, and (3) the doctrine of *forum non conveniens* being an equitable doctrine, the defendants came into the New Jersey Court with unclean hands by reason of the fact that it failed and refused to qualify as a foreign corporation in Puerto Rico, where it could be available for *in personam* service of process. The motions to dismiss were granted upon certain terms, including the acceptance of service of complaint and the payment to counsel of his disbursements and a counsel fee (R. 42a). The opinion of the New Jersey Superior Court is reported at 44 N. J. Super. 536, 131 A. 2d 139 (April 4, 1957).

On appeal the three suits were consolidated and the Supreme Court of New Jersey sustained the dismissals and

also affirmed the award of litigation expenses, including counsel fees, holding that the dismissal of the causes of action was conditioned upon the payment of counsel fees because the plaintiffs were forced to incur litigation expenses in New Jersey and that *in personam* jurisdiction while available in New Jersey was unavailable in Puerto Rico. The opinion of the New Jersey Supreme Court is reported in 135 Atl. 2d 857 (11/12/57).

The dismissal of the three complaints is a final judgment and denies access to the New Jersey Courts to three plaintiffs who sue under the Jones Act for injuries sustained by each of them in the navigable waters off Puerto Rico even though Puerto Rico offers no haven for *in personam* jurisdiction whereas *in personam* jurisdiction is available in the courts of New Jersey.

Reasons For Granting The Writ.

The decisions below should be reviewed because they interpret the jurisdictional requirements of the Jones Act in a way not in accord with applicable decisions of this court. Either the decisions below are in conflict with the decisions of this Court in *Miles* v. *Illinois Central R. Co.*, 315 U. S. 698 (1942); *Baltimore & Ohio R. Co.* v. *Kepner*, 314 U. S. 44 (1941); *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501 (1947); *Ex Parte Collett*, 337 U. S. 55 (1949); *Pope* v. *Atlantic Coast Line R. Co.*, 345 U. S. 379 (1953), or, if they are not so in conflict, are they in accord with *State ex rel. Southern R. Co.* v. *Mayfield*, 340 U. S. 1 (1950), even though in Mayfield, the plaintiff had the choice of jurisdictions while in the present petition, the petitioners had no choice but to institute suit where the principal office of the respondents was located. In either event, this court should grant review.

1. In Mayfield, this Court held that according to its own notions of procedural policy, a State may reject, as it may accept, the doctrine of *forum non conveniens* for all causes of actions begun in its courts. However, in that case the carrier was a foreign corporation and there seems to be no doubt that the injured had a choice of forums. In the present cases, the only forum provided the plaintiffs for *in personam* jurisdiction was New Jersey.

2. In Pope, Section 6 of the F. E. L. A. established the right of the petitioner to sue in Alabama. The injury to the petitioner and his residence was in Georgia. His employer instituted an equity suit in Georgia to restrain petitioner from prosecuting his action in Alabama. Georgia granted the injunction and this Court granted certiorari. This Court held that Section 1404(a) only applies to federal courts and not to state courts. It held that Section 1404(a) did not disturb the rulings of this Court in Kepner and Miles to the effect that a State Court cannot restrain a resident from prosecuting his claim in a Federal or State Court of another jurisdiction where the suit had been brought.

3. These cases are readily distinguishable from the cases aforementioned and that of *Gore* v. *United States Corp.*, 102 Atl. 2d 670, 15 N. J. 301; cert. denied 348 U. S. 861 (1954), relied on by the New Jersey Superior and Supreme Courts. The defendants are New Jersey corporations having principal offices in New Jersey and agents upon whom process may be served are located there. The petitioners are residents of Puerto Rico who were injured while working in the navigable waters off Puerto Rico. *In personam* jurisdiction was available in New Jersey; Puerto Rico offered no such haven. The respondents had no agent in Puerto Rico upon whom process could have been

served and the petitioners were faced with the necessity of invoking the aid of the New Jersey Court for the prosecution of their causes of action. The petitioners sought the only forum which had *in personam* jurisdiction over the respondents.

4. The State Court conditioned its dismissal of the causes of action upon the defendants accepting service of summons and complaint in a court of Puerto Rico having jurisdiction of the subject matter set forth in the complaints. The Insular Court of Puerto Rico cannot be considered State courts because Puerto Rico is not a State and 45 U. S. C. 56, made applicable to Jones Act cases provided as follows:

> ". . . The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several states."

In essence, therefore, the State Court is remanding these cases to the United States District Court and it has not the power so to do.

5. The State Court directed the defendants to appear in Puerto Rico. Could not this be considered an attempt on the part of the State Court to compel the defendants to perform an *ultra vires* act, because the defendants have failed and have apparently refused to qualify in Puerto Rico, even though the defendants have been and will, in the future, continue to do business in Puerto Rico? Does the act of the defendants incorporating in the State of New Jersey and their failure to qualify in the jurisdiction of Puerto Rico, give to New Jersey the sole and exclusive right of obtaining *in personam* jurisdiction over transitory actions? While the defendants are accepting all of the benefits of doing business in Puerto Rico, by their refusal

to qualify there, they are intentionally avoiding *in personam* service of process there and compelling plaintiffs to first institute litigation at their corporate homes, 1800 miles away from the home of the plaintiffs, and then, if they so desire, dismissing the actions on the theory that the forum selected by plaintiffs was not a convenient one in which to air the litigation.

6. The questions presented in these consolidated cases are of great and recurring significance in the administration of the Jones Act. The petitioners have asserted their venue rights under the Jones Act and these rights should not be impaired by the application of state *forum non conveniens* law, as the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. *Arnold* v. *Panhandle and Sante Fe R. Co.*, 353 U. S. 360 (1957).

Conclusion.

For the reasons set forth above, it is respectfully submitted that the consolidated petition for a writ of certiorari should be granted.

Samuel M. Cole,
Attorney for Petitioners.

Louis J. Greenberg,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

ANGEL PAIN VARGAS,
Petitioner,
vs.
A. H. BULL STEAMSHIP CO.,
Respondent.

FELIPE ALMESTICA,
Petitioner,
vs.
BALTIMORE INSULAR LINE, INC.,
Respondent.

JUAN ECHEVARRIA RODRIGUEZ,
Petitioner,
vs.
A. H. BULL STEAMSHIP CO.,
Respondent.

Civil Actions

On Consolidated Petition for Writ of Certiorari to the Supreme Court of New Jersey

ANSWER TO PETITION FOR WRIT OF CERTIORARI

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Counter-Statement of Question Presented for Review

May a state court in New Jersey, the state of defendants' incorporation, dismiss, on the ground of *forum non conveniens*, actions brought under the Jones Act:

a) upon unchallenged findings that Puerto Rico is the more convenient forum, and that, other than being the defendants' corporate domicile, New Jersey has no connection whatever with the causes of action;

b) upon defendants' offer to submit to suit in Puerto Rico, the defendants not being amenable to personal service in that jurisdiction; and

c) upon condition that defendants so submit to suit in Puerto Rico?

Counter-Statement of the Case

Each of the three plaintiffs is a longshoreman residing in Puerto Rico, who sustained an accident while working as a longshoreman aboard a ship owned by one of the respective defendants. Each brought an action in the New Jersey Superior Court, Law Division, to recover damages for the resulting personal injuries. On seasonable motions by the respective defendants, the Law Division dismissed each action on the basis of *forum non conveniens*, whose opinion is reported at 44 N. J. Super. 536, 131 Atl. 2d 139. The judgment of dismissal was affirmed by the New Jersey Supreme Court for the reasons stated in the Law Division. The *per curiam* opinion by the New Jersey Supreme Court is reported at 25 N. J. 293, 135 Atl. 2d 857.

Petitioners do not challenge the findings of the Law Division that each accident occurred in Puerto Rico; that the petitioners and the witnesses reside in Puerto Rico;

that the applicable medical and employment records are located in Puerto Rico; that the language common to the plaintiffs and the witnesses is Spanish; that inconvenience and expense would result if the cases were tried in New Jersey; and that these cases had no place in the New Jersey courts except for the fact that the defendants are corporations in New Jersey (44 N. J. Super. at 551; 131 Atl. 2d at 48; R. 16a).

In moving to dismiss the complaints on the ground of *forum non conveniens*, each defendant pledged itself to appear voluntarily in any action which might be brought against it by the respective plaintiffs in the courts of Puerto Rico growing out of the accidents which are the subjects of these cases. The respective judgments, which are sought to be reviewed, granted dismissal on condition that the defendants do so. The judgments are set forth at pages 42a to 47a of the Appendix prepared for the Superior Court of New Jersey, Appellate Division.

ARGUMENT

POINT I

The state court does have power to dismiss a Jones Act suit under the doctrine of *forum non conveniens*.

This court has already made it clear that a state court is free to apply to a Jones Act suit its own doctrine of *forum non conveniens*, provided that such doctrine is non-discriminatory and in accord with the requirements of the Privileges and Immunities Clause.

This doctrine is to be applied in a Jones Act case in the same way as in an action brought under the Federal Employers Liability Act (45 U.S.C.A. Sections 51-60). It was so contended by the petitioners in the Superior Court of New Jersey; see 44 N. J. Super. 540; 131 Atl. 2d 41; (R. 3a). Respondents agree.

In *Second Employers' Liability Cases*, 223 U. S. 1 (1912), this court held that the duty on the part of a state court to hear an action brought under the Federal Employers' Liability Act did not involve any infringement by Congress of the state's power to regulate the jurisdiction of its courts or to control or affect their modes of procedure. Thus, VAN DEVANTER, *J.* said for the court at page 56:

> "• • • there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of state courts or to control or affect their modes of procedure, but only a question of the duty of such a court, when its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion and is invoked in conformity with those laws, to take cognizance of an action to enforce a right of civil recovery arising under the act of Congress and susceptible of adjudication according to the prevailing rules of procedure."

Bainbridge v. *Merchants & Miners Co.*, 287 U. S. 278 (1932), was an action brought in the state court of Pennsylvania under the Jones Act. The state court dismissed the action on the ground that the word "district" as used in 46 U. S. C. §688, required the action to be brought in Maryland where the defendant's principal office was located. The Supreme Court reversed and held that the word "district" referred only to venue in the Federal courts and did not apply to a Jones Act suit brought in a state court. In this connection, SUTHERLAND, *J.* said for the court at page 280:

> "• • • If the question were more doubtful than we think it is, we should be slow to impute to Congress an intention, if it has the power, to interfere with the statutory provisions of the various states fixing the venue of their own courts. It follows that the venue should have been determined by the trial court in accordance with the law of the state."

The power of a state to determine what controversies shall be heard in its own courts was clearly laid down in *Chambers* v. *Baltimore & Ohio Railroad Co.*, 207 U. S. 142 (1907), wherein the court stated at page 148:

> "But, subject to the restrictions of the Federal Constitution, the State may determine the limits of the jurisdiction of its courts, and the character of the controversies which shall be heard in them. The State policy decides whether and to what extent the State will entertain in its courts transitory actions, where the causes of action have arisen in other jurisdictions. Different States may have different policies and the same State may have different policies at different times. But any policy the State may choose to adopt must operate in the same way on its own citizens and those of other States. The privileges which it affords to one class it must afford to the other. Any law by which privileges to begin actions in the courts are given to its own citizens and witheld from the citizens of other States is void, because in conflict with the supreme law of the land."

In *Douglas* v. *New Haven & Hartford Railroad Co.*, 279 U. S. 377 (1929), HOLMES, *J.* said for the court at 387:

> "As to the grant of jurisdiction in the Employers' Liability Act, that statute does not purport to require State Courts to entertain suits arising under it, but only to empower them to do so, so far as the authority of the United State is concerned. It may very well be that if the Supreme Court of New York were given no discretion, being otherwise competent, it would be subject to a duty. But there is nothing in the Act of Congress that purports to force a duty upon such Courts as against an otherwise valid excuse. Second Employers' Liability Cases, 223 U. S. 1, 56, 57."

That the state courts may decide whether or not to entertain an action brought under the Federal Employers' Liability Act, provided that the basis for such decision is non-discriminatory and consistent with the requirements of the Privileges and Immunities Clause, was reiterated in *McKnett* v. *St. Louis & San Francisco Railway Co.*, 292 U. S. 230 (1934), wherein BRANDEIS, *J.* said for the court at p. 233:

> "While Congress has not attempted to compel states to provide courts for the enforcement of the Federal Employers' Liability Act, *Douglas* v. *New York, N.H. & H.R. Co.*, 279 U. S. 377, 387, the Federal Constitution prohibits state courts of general jurisdiction from refusing to do so solely because the suit is brought under a federal law. The denial of jurisdiction by the Alabama court is based solely upon the source of law sought to be enforced. The plaintiff is cast out because he is suing to enforce a federal act. A state may not discriminate against rights arising under federal laws."

It is submitted that the last three cited cases completely refute the petitioners' contention that a state court has no power to apply the doctrine of *forum non conveniens* in a Jones Act suit.

Miles v. *Illinois Central Railroad Co.*, 315 U. S. 698 (1942); *Baltimore & Ohio Railroad Co.* v. *Kepner*, 314 U. S. 44 (1941); and *Pope* v. *Atlantic Coast Line Railroad Co.*, 345 U. S. 379 (1953) which are cited and relied upon by petitioners on page 5 of their petition herein, are distinguishable from the instant case so that the decision below is not in conflict with them. None of those cases involved the application by a state court of the doctrine of *forum non conveniens* to an action pending therein. Instead, in each of those cases, the state court was asked

to enjoin the prosecution of a Federal Employers' Liability suit in a different state or Federal court. There is an obvious distinction between the power of a court to determine what controversies it will hear, and the power of the court to determine what controversies the courts in another sovereign jurisdiction will hear.

In *Southern Railway Co.* v. *Mayfield*, 340 U. S. 1 (1950), this court expressly held that the *Kepner* and *Miles* cases did not deprive a state court of the power to apply *forum non conveniens* to suits brought under the Federal Employers' Liability Act. In that case, the U. S. Supreme Court had before it two cases in which the Supreme Court of Missouri had dismissed writs of mandamus to compel a state trial court to exercise discretionary jurisdiction in disposing of motions to dismiss F.E.L.A. suits on the ground of *forum non conveniens*. The U. S. Supreme Court held that the state court did possess such discretionary power and, therefore, vacated the judgments below and remanded the cases to the Supreme Court of Missouri. In so doing, the court expressly held that neither *Miles* nor *Kepner* prevented a state court from dismissing an F.E.L.A. suit under the doctrine of *forum non conveniens*. The opinion of the court, per FRANKFURTER, *J.* states at 340 U. S. 4:

> "* * * Giving the opinion of the Supreme Court of Missouri in these cases a scope most favorable to reliance on a non-federal ground, doubt still remains whether that Court did not deem itself bound to deny the motions for dismissal on the score of *forum non conveniens* by its view of the demands of our decisions in *Baltimore & O. R. Co.* v. *Kepner*, 314 U. S. 44, and *Miles* v. *Illinois Central R. Co.*, 315 U. S. 698.
>
> "But neither of these cases limited the power of a State to deny access to its courts to persons seeking recovery under the Federal Employers' Liability Act

if in similar cases the State for reasons of local policy denies resort to its courts and enforces its policy impartially, see *McKnett* v. *St. Louis & S. F. R. Co.*, 292 U. S. 230, so as not to involve a discrimination against Employers' Liability Act suits and not to offend against the Privileges-and-Immunities Clause of the Constitution. No such restriction is imposed upon the States merely because the Employers' Liability Act empowers their courts to entertain suits arising under it. There was nothing in that Act even prior to §1404(a) of the 1948 revision of the Judicial Code, Title 28, U. S. C., which purported 'to force a duty' upon the State courts to entertain or retain Federal Employers' Liability litigation 'against an otherwise valid excuse.' *Douglas* v. *New York, N. H. & H. R. Co.*, *supra*, at 388.

"Therefore, if the Supreme Court of Missouri held as it did because it felt under compulsion of federal law as enunciated by this Court so to hold, it should be relieved of that compulsion. It should be freed to decide the availability of the principle of *forum non conveniens* in these suits according to its own local law. To that end we vacate the judgment of the Supreme Court of Missouri and remand the cause to that Court for further proceedings not inconsistent with this opinion."

It is also illuminating to consider the concurring opinion of JACKSON, *J.*, who said at 340 U. S. p. 5:

"The Missouri Court appears to have acted under the supposed compulsion of *Miles* v. *Illinois Central R. Co.*, 315 U. S. 698, among other of this Court's decisions. The deciding vote in that case rested, in turn, only on what seemed to be compulsion of statutory provisions as to venue. By amendment, 28 U. S. C. §1404(a), as interpreted in *Ex parte Collett*, 337 U. S.

55, Congress has removed the compulsion which determined the *Miles* case, and the Missouri Court should no longer regard it as controlling. A federal court in Missouri would now be free to decline to hear this case and could transfer it to its proper forum. Certainly a State is under no obligation to provide a court for two nonresident parties to litigate a foreign-born cause of action when the Federal Government, which creates the cause of action, frees its own courts within that State from mandatory consideration of the same case. Because of what I wrote in the *Miles* case I add this note, but otherwise concur in the decision and opinion of the Court."

The effect of the decision in *Southern Railway Co. v. Mayfield* is to affirm the power of the Court below to have granted the motions, and to distinguish the *Kepner* and *Miles* cases (and necessarily the *Pope* case) from the present issues.

The holding of the Court below,—namely, that a state court does possess the power to dismiss Jones Act suits on the ground of *forum non conveniens*,—is supported by decisions in other states. Even prior to *Southern Railway Co. v. Mayfield*, it had been held that state courts could apply the doctrine of *forum non conveniens* so as to dismiss an F.E.L.A. action.

Walton v. Pryor, 276 Ill. 563, 115 N. E. 2 (S. Ct. 1917);

Marman v. Wabash Ry. Co., 246 N. Y. 244, 158 N. E. 508 (C. of A. 1927);

Mooney v. Denver & R. G. W. R. R. Co., 118 Utah 307, 221 Pac. 2d 628 (S. Ct. 1950), an encyclopedic and well reasoned opinion, written after the *Kepner* and *Miles* cases and before *Mayfield*, which correctly divined the law as later declared in *Mayfield*.

Since *Southern Railway Co. v. Mayfield*, and on the basis of that decision, state courts have recognized and exercised their power to apply their own doctrine of *forum non conveniens* to F.E.L.A. suits.

Price v. *Atchison, T. & S. F. Ry. Co.*, 42 Cal. 2d 577, 268 Pac. 2d 457 (S. Ct. 1954);
Atlantic Coast Line v. *Pope*, 93 Ga. App. 550, 92 S. E. 2d 300 (C. of A. 1956);
Peterie v. *Thompson*, 10 Ill. App. 2d 100, 134 N. E. 2d 534 (1956);
Johnson v. *C. B. & Q. R. R. Co.*, 243 Minn. 58, 66 N. W. 2d 763 (S. Ct. 1954);
Maynard v. *C. & N. W. Ry. Co.*, 247 Minn. 228, 77 N. W. 2d 183 (S. Ct. 1956);
St. Louis-S. F. Ry. Co. v. *Superior Court*, 276 Pac. 2d 773 (Okla. S. Ct. 1954), 290 Pac. 2d 118 (Okla. S. Ct. 1955).

Manifestly, the power of a state court to apply the doctrine of *forum non conveniens* in a Jones Act case is sanctioned by repeated decisions of this Court, and of state courts of last resort.

POINT II

The application of its doctrine of *forum non conveniens* by the New Jersey court presents no federal question.

Petitioners nowhere assert that the doctrine of *forum non conveniens*, as formulated and applied by the New Jersey courts, contravenes the Privileges and Immunities Clause or discriminates against Jones Act cases. From the decisions of this Court already quoted herein, it would seem that these were the only valid grounds of attack upon the judgment below, and these grounds have not been urged.

The authoritative exposition of the doctrine of *forum non conveniens* in New Jersey is found in *Gore* v. *U. S. Steel Corp.*, 15 N. J. 301, 104 Atl. 2d 670 (1954), cert. den. 348 U. S. 861 (1954). In formulating the doctrine, the New Jersey Supreme Court was careful to avoid transgressing the constitutional limitations, 15 N. J. at 311; 104 Atl. 2d at 675-676.

Petitioners' complaint seems to be primarily that the New Jersey court dismissed these actions even though, at the time they were instituted, personal service upon the defendants in Puerto Rico could not be had. However, the defendants herein agreed that, if the present actions were dismissed, they would voluntarily appear in actions brought by these plaintiffs in Puerto Rico on the same grounds; see 44 N. J. Super. at 539; 131 Atl. 2d at 40 (R. 2a). The judgments of dismissal were conditioned upon the defendants so doing; see 44 N. J. Super. at 552; 131 Atl. 2d at 48 (R. 17a).

Whether dismissal, on terms and conditions, may be made by a court in the only jurisdiction where *in personam* process can be obtained is not a federal question, but a matter of the applicable state doctrine of *forum non conveniens*. The New York courts have held that an action may be dismissed, under the doctrine of *forum non conveniens*, where the defendant agrees voluntarily to appear and litigate the case in a jurisdiction where he could not have been originally sued, *Rodrigue* v. *A. H. Bull S.S. Co.*, 286 App. Div. 804, 143 N. Y. S. 2d 618 (App. Div. 1955); *Ivy* v. *Stoddard*, 147 N. Y. S. 2d 469 (S. Ct. 1955). In the case at bar the New Jersey courts have adopted the same view; see 44 N. J. Super. at 543; 131 Atl. 2d at 42-43 (R. 6a to 7a).

Petitioners herein argue that the doctrine of *forum non conveniens* "presupposes at least two forums in which the

defendant is amenable to involuntary service of process," pages 2 and 4 of the petition for certiorari. Language to that effect was used in this court's opinion in *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501 at 507 (1947). But in the *Gilbert* case, this court was formulating the doctrine of *forum non conveniens* for application by the Federal courts. It was not laying down any principle of constitutional law or of the interpretation of any Federal statute, nor any other doctrine which was binding upon the courts of the several states. Language to this effect was not employed by the New Jersey Supreme Court in formulating the New Jersey doctrine of *forum non conveniens* in *Gore v. U. S. Steel Corp., supra*. On the contrary, in *Gore* the test was stated, not as the existence of "at least two forums in which the defendant is amenable to process", but rather as to whether "there is available another forum, where trial will best serve the convenience of the parties and the ends of justice," 15 N. J. at 305 and 311; 104 Atl. 2d at 672 and 676. In the cases at bar, the availability of another forum was presented by the offer of the defendants to appear personally in the Puerto Rico courts. This offer satisfies the requirements of the New Jersey doctrine of *forum non conveniens*. Therefore, no Federal question is presented.

Petitioners argue that "the defendants came into the New Jersey court with unclean hands" (pages 2 and 4; see also paragraph No. 5 on page 7 of petition for certiorari. This point is utterly without substance. "Unclean hands" applies only to a plaintiff in an equity proceeding, and not to a defendant in any proceeding.

Ciarl v. Watts, 10 N. J. Super. 283, 77 Atl. 2d 188 (Ch. Div. 1950);

Thomas v. Flanagan, 99 N. J. Eq. 198, 132 Atl. 305 (Ch. 1926).

CONCLUSION

In conclusion, therefore, respondents respectfully submit that the decisions below interpreted the jurisdictional requirements of the Jones Act in strict and faithful accord with the applicable decisions of this court; that no Federal question of substance is presented; and that the petition for certiorari should be denied.

Respectfully submitted,

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